(21,049.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 89.

RICKEY LAND AND CATTLE COMPANY, PETITIONER,

vs.

MILLER AND LUX.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 1, 1909.

a United States Circuit Court of Appeals for the Ninth Circuit.

No. 1366.

RICKEY LAND AND CATTLE COMPANY (a Corporation), Appellant,
vs.
MILLER & LUX (a Corporation), Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the United States Circuit Court for the District of Nevada.

1 In the United States Circuit Court of Appeals, Ninth Circuit.

MILLER & LUX (a Corporation), Complainant,
vs.
THE RICKEY LAND AND CATTLE COMPANY (a Corporation), Defendant.

Order Extending Time to Docket Cause.

Good cause therefore appearing, it is hereby ordered that the time wherein defendant and appellant in the above-entitled action may file the record thereof and docket the case with the clerk of this Court at San Francisco, California, may be enlarged and extended, so as to extend to and include the 23d day of September, 1906, and it is so ordered.

Dated this 22d day of August, 1906.

WM. M. MORROW,
Circuit Judge.

[Endorsed:] No. 1366. In the United States Circuit Court of Appeals, Ninth Circuit, District of California. Miller & Lux, a corporation, Complainant, vs. Rickey Land and Cattle Company, a corporation, Defendant. Order extending time. Filed Aug. 24, 1906. F. D. Monckton, Clerk. Refiled Aug. 29, 1906. F. D. Monckton, Clerk.

2 In the Circuit Court of United States for the District of Nevada. In Equity.

MILLER & LUX (a Corporation), Complainant,
vs.
THE RICKEY LAND AND CATTLE COMPANY (a Corporation), Defendant.

Bill of Complaint.

To the Judges of the Circuit Court of the United States for the District of Nevada:

Miller & Lux, a corporation organized and existing under the laws of the State of California, and having its principal place of business

at San Francisco, California, and a citizen of the State of California, brings this its bill against the Rickey Land and Cattle Company, a corporation organized and existing under the laws of the State of Nevada, and having its principal place of business at Carson City, in the County of Ormsby, State of Nevada, and within the District of Nevada, and a citizen of the State of Nevada; and thereupon your orator complains and says:

1. That your orator is a corporation organized and existing under the laws of the State of California, and has its principal place of business at San Francisco, in the State of California, and is a
3 citizen of the State of California; and it has been such corporation, and has had its principal place of business at the place aforesaid, continuously since the 5th day of May, 1897.

2. That the defendant, the Rickey Land and Cattle Company, is a corporation organized and existing under the laws of the State of Nevada, and has its principal place of business at Carson City, in the County of Ormsby, in the said State of Nevada, and within said District of Nevada, and is a citizen of the State of Nevada.

3. That on the 10th day of June, 1902, your orator exhibited to and and filed in this Court its bill of complaint against one Thomas B. Rickey, and against many other persons; which suit is numbered 731 on the equity docket of this Court.

4. That thereafter, on the said 10th day of June, 1902, this Court duly issued its writ of subpœna in said suit upon said bill of complaint, directed to the said Thomas B. Rickey and the other persons made defendants by said bill; and thereafter, on the said 10th day of June, 1902, the said writ of subpœna was duly served by the marshal of this district upon the said Thomas B. Rickey, and was thereafter served upon the other defendants in said suit.

5. That thereafter the said Thomas B. Rickey entered his appearance in said suit, and thereafter filed in this Court his plea to
4 the jurisdiction of said Court, which plea was overruled by this Court, and the said Thomas B. Rickey was by this Court ruled to answer to said bill of complaint, and he has answered the same.

6. That the other defendants in said suit have entered appearances in said suit; and the said suit is now pending and undetermined in this Court as to all of the defendants thereto.

7. That in and by the said bill of complaint your orator (complainant therein) alleged, among other things, that it then was, and for a long time prior thereto had been, the owner and seized in fee and in the actual possession of certain lands situated in the County of Lyon, State of Nevada, in said District of Nevada, in said bill particularly enumerated and described; and further alleged that there is a certain natural stream and watercourse known as Walker River, which flows, and from time immemorial has flowed, to, over, upon, and through the said lands, and that said lands include the banks, bed, and stream of said river; and further alleged that, at divers times therein set forth, your orator, its grantors and predecessors in interest, had first appropriated and diverted from said river portions of the waters of said river, amounting in all to a flow of nine hun-

dred and forty-three and twenty-nine hundredths (943.29) cubic feet of water per second, and that it and they had carried the same
5 from said river to and upon certain lands and used the same for the irrigation thereof, and that your orator was then the owner by such appropriation of certain interests in said appropriated water therein particularly set forth and enumerated; and further alleged that, within three years next before the filing of said bill, the defendants thereto, including the said Thomas B. Rickey, had, and that each of them had, diverted the waters of said Walker River at divers places on said river above the said lands of your orator, and above the points at which your orator so diverts said water, and that a large portion of said water so diverted by the defendants in said suit is never returned to said river, and that said defendants to said suit are continuing the diversions aforesaid, and have thereby deprived and are depriving your orator of a large portion of said water to which your orator is so entitled; and further alleged that each of said diversions so made by the defendants to said suit is without right, but that they have so diverted said water, and are so diverting the same under claim of right so to do, and adversely to your orator; and further allege that, by the diversions aforesaid, your orator has been deprived and is being deprived of sufficient water to irrigate its lands aforesaid, and is thereby rendered unable, and so long as said diversions are continued will be unable to irrigate its said lands which it had theretofore been accustomed to irrigate, and is thereby
6 rendered unable and will be unable to properly or successfully cultivate the said lands or to raise crops thereon; and further alleged that, if the defendants to said suit or either of them has any right to divert any water from the said river, such rights and each of them are subsequent and subordinate to the aforesaid appropriations so made by your orator, and its grantors and predecessors in interest; and further alleged that the matter in dispute in said suit, to wit, the said rights of your orator so infringed by the said acts of the defendants to said suit, exceeds, exclusive of interest and costs, the value of two thousand dollars ($2,000).

8. That, in and by the said bill of complaint, your orator, among other things, prayed that the defendants to said suit, including the said Thomas B. Rickey, be forever enjoined and restrained from diverting any water from the said Walker River, above the points where your orator so diverts the same, in such manner or to such extent as to deprive your orator of any of the water aforesaid, and also for general relief.

9. That thereafter, to wit, on the 6th day of August, 1902, and after the filing of the said bill of complaint, and after the service upon the said Thomas B. Rickey of the writ of subpœna in said suit, and after the said Thomas B. Rickey had appeared therein, the
7 said Thomas B. Rickey caused the defendant, the Rickey Land and Cattle Company, to be organized and incorporated, and it was, on that day, organized and incorporated under the laws of the State of Nevada.

10. Upon and according to its information and belief, your orator avers that the only person really interested in said corporation de-

fendant, or really owning any of the stock thereof, is the said Thomas B. Rickey, and that the other persons forming the said corporation and holding the stock thereof are only nominees of the said Thomas B. Rickey, and hold their said stock solely for him and for his benefit.

11. That, as your orator is informed and believes, the said Thomas B. Rickey, at the time of the commencement of the suit aforesaid, was the owner and had, for a long time theretofore, been the owner of certain lands situated on the said Walker River, and on certain branches or tributaries thereof, and was diverting certain water from the said Walker River, and from the said branches and tributaries thereof, for the irrigation of his said lands and claiming the right so to do.

12. That after the said incorporation and organization of the said Rickey Land and Cattle Company, the defendant herein, the said Thomas B. Rickey conveyed to said corporation all his lands aforesaid, and all the rights owned or claimed by him to divert
8 any water from the said Walker River; and the said defendant corporation has ever since claimed to be the owner of said lands and water rights.

13. That thereafter, to wit, on the 15th day of October, 1904, the said defendant, the Rickey Land and Cattle Company, commenced an action in the Superior Court of the County of Mono, State of California, against your orator and against a large number of other persons, which action is numbered 1055 on the register of said Superior Court.

14. That said action was commenced by said defendant, as plaintiff therein, by the filing of a complaint, in and by which the said defendant (plaintiff therein) alleged, among other things, that it is, and had been since the 6th day of August, 1902, the owner, in possession, and entitled to the possession of certain of the lands aforesaid so conveyed to it by the said Thomas B. Rickey; and further alleged that the said lands constituted one entire contiguous body of land, over, through, and upon which flows, and from time immemorial has flowed, a certain branch or tributary of said Walker River called the West Fork of the Walker River, and that said lands and all thereof are, and from time immemorial have been, riparian to said West Fork of said river, and situated along and bordering thereupon; and further alleged that the said defendant (plaintiff therein) is the owner, in the possession of, and entitled to the
9 possession, use, and enjoyment of, and has the right to divert and appropriate all the waters of the said West Fork of said Walker River and its tributaries in the State of California, to the extent of a constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second; and further alleged that the said Walker River is, and from time immemorial has been, a natural stream or watercourse having its source in two branches known as the East Fork of the Walker River and the West Fork of the Walker River, and that both of said branches have their source in the State of California, and from thence flow through the eastern part of the said State of California into and through the western part of the

State of Nevada, and that said two branches of said Walker River unite in said State of Nevada; and further alleged that the defendants in said action and each of them, including your orator, claim some right, title, and interest adverse to the defendant herein (plaintiff therein) in and to said constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second, or some part or portion thereof, in the West fork of the Walker River, that said right, title and interest so claimed by said defendants and each of them, including your orator, in and to said water is without right,
10 and that all claims of them and each of them to the waters of said West Fork of said Walker River are subordinate and subject to the said alleged ownership of the defendant herein, (plaintiff therein), and its alleged right to divert and appropriate from said West Fork of said Walker River a constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second.

15. That in and by said complaint the defendant herein (plaintiff therein) prayed, among other things, that the said Superior Court should adjudge that the defendant herein (plaintiff therein) is the owner, in the possession, use, enjoyment, and entitled to the possession, use and enjoyment, of, and has the right to appropriate and divert all the waters of the said West Fork of the said Walker River in the State of California, to the extent of a constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second; and that said court further adjudge that neither of the defendants therein, including your orator, has any right, title, interest, claim, or estate in or to any of the waters flowing or which may hereafter flow in the said West Fork of the said Walker River in the State of California, when the quantity of water therein flowing is less than fifteen hundred and seventy-five (1575) cubic feet of water per second, and that it be further adjudged that the said defendants and each of them, including your orator, are
11 estopped to claim or assert against the defendant herein (plaintiff therein), its grantees, successors, or assigns, any right, title, claim, interest, or estate in or to any of the waters now flowing, or which may hereafter flow, in said West Fork of said Walker River in the State of California, when the quantity of water therein flowing is less than fifteen hundred and seventy-five (1575) cubic feet of water per second; and also for general relief.

16. That, upon the filing of said complaint in said Superior Court, there was issued out of said court its writ of summons thereupon, which is the appropriate process under the laws of the State of California for obtaining jurisdiction over the persons of the defendants in an action; and thereafter, to wit, on the 22d day of October, 1904, the said writ of summons was served upon your orator.

17. That, on the said 15th day of October, 1904, the defendant herein, as plaintiff, commenced another action in said Superior Court of said County of Mono, State of California, against your orator and against a large number of other persons, which action is numbered 1056 on the register of said court.

18. That said action was commenced by said defendant, as plaintiff therein, by the filing of a complaint, in and by which the said

defendant (plaintiff therein) alleged, among other things, that it is, and has been since the 6th day of August, 1902, the owner,
12 in possession, and entitled to the possession of the rest of the lands aforesaid so conveyed to it by the said Thomas B. Rickey; and further alleged that the said lands constituted one entire contiguous body of land, over, through, and upon which flows, and from time immemorial has flowed, a certain branch or tributary of said Walker River called the East Fork of the Walker River, and that said lands and all thereof are, and from time immemorial have been, riparian to said East fork of said river, and situated along and bordering thereupon; and further alleged that the said defendant (plaintiff therein) is the owner, in the possession of, and entitled to the possession, use, and enjoyment of, and has the right to divert and appropriate all the waters of the said East Fork of said Walker River and its tributaries in the State of California, to the extent of a constant flow of five hundred and four (504) cubic feet of water per second; and further alleged that the said Walker River is, and from time immemorial has been, a natural stream or watercourse having its source in two branches known as the East Fork of the Walker River and the West Fork of the Walker River, and that both of said branches have their source in the State of California, and from thence flow through the eastern part of the said State of California into and through the western part of the State of
13 Nevada, and that said two branches of said Walker River unite in said State of Nevada; and further alleged that the defendants in said action and each of them, including your orator, claim some right, title and interest adverse to the defendant herein (plaintiff therein) in and to said constant flow of five hundred and four (504) cubic feet of water per second, or some part or portion thereof, in the East Fork of the Walker River; that said right, title and interest so claimed by said defendants and each of them, including your orator, in and to said water is without right, and that all claims of them and each of them to the waters of said East Fork of said Walker River are subordinate and subject to the said alleged ownership of the defendant herein (plaintiff therein), and its alleged right to divert and appropriate from said East Fork of said Walker River a constant flow of five hundred and four (504) cubic feet of water per second.

19. That in and by said complaint the defendant herein (plaintiff therein) prayed, among other things, that the said Superior Court should adjudge that the defendant herein (plaintiff therein) is the owner, in the possession, use, enjoyment, and entitled to the possession, use, and enjoyment, of, and has the right to appropriate and divert all the waters of the said East Fork of the said Walker River in the State of California, to the extent of a constant
14 flow of five hundred and four (504) cubic feet of water per second; and that said court further adjudge that neither of the defendants therein, including your orator, has any right, title, interest, claim or estate in or to any of the waters flowing or which may hereafter flow in the said East Fork of the said Walker River in the State of California, when the quantity of water therein

flowing is less than five hundred and four (504) cubic feet of water per second, and that it be further adjudged that the said defendants and each of them, including your orator, are estopped to claim or assert against the defendant herein (plaintiff therein), its grantees, successors, or assigns, any right, title claim, interest, or estate in or to any of the waters now flowing, or which may hereafter flow, in said East Fork of said Walker River in the State of California, when the quantity of water therein flowing is less than five hundred and four (504) cubic feet of water per second; and also for general relief.

20. That, upon the filing of said complaint in said Superior Court, there was issued out of said court its writ of summons thereupon, which is the appropriate process under the laws of the State of California for obtaining jurisdiction over the persons of the defendants in an action; and thereafter, to wit, on the 22d day of October, 1904, the said writ of summons was served upon your orator.

15 21. That by the laws of the State of California an action is commenced in the courts of that State merely by the filing of a complaint, and that from and after the filing of such complaint such action is deemed to be pending in the Court in which such complaint is filed.

22. That the issues tendered by said complainants in said two actions so brought by the defendant herein as plaintiff against your orator and said other persons are, so far as concerns your orator, the same issues which were tendered by the said bill of complaint of your orator so filed in this Court, so far as the same related to the defendant, Thomas B. Rickey, in said suit.

23. That, at the time of the filing by the defendant herein of its complaint aforesaid, the said defendant did not have or claim to have, and does not now have or claim to have, any right whatever in or to any of the waters of said Walker River, or of any branch or tributary thereof, except such rights, if any, as it acquired by said conveyance to it from the said Thomas B. Rickey.

24. That the defendant herein, in and by the actions aforesaid, intended, and the necessary effect of said actions is, to bring on for trial and determination in said Superior Court the same issues presented by the said bill of complaint of your orator in the

16 said suit so brought by it in this Court, so far as relates to the issues between your orator and the said Thomas B. Rickey, and to obtain from said Superior Court a judgment determining said issues in advance of a determination of the same by this Court, and thereby to defeat the jurisdiction of this Court in the said suit so now pending before it, and to hinder and embarrass this Court in the trial of said issues, and in the enforcement of any decree which this Court may render in the said suit so pending before it; and further prosecution of said actions, or either of them, as against your orator would therefore be in derogation of the jurisdiction of this Court and of the rights of your orator in the suit so brought by it in this Court and now pending therein.

25. That the matter in dispute herein, to wit, the right of your orator to maintain its suit aforesaid without hindrance from or interference by any other court, exceeds, exclusive of interest and costs, the sum of two thousand ($2,000).

And your orator alleges that all of the said acts, doings, and claims of the said defendant herein are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orator in the premises. In consideration whereof, and forasmuch as your orator is remediless in the premises, at and by the strict rules of the common law, and can have relief only in
17 a court of equity, where matters of this kind are properly cognizable and relievable, to the end therefore that your orator may have that relief which it can attain only in a court of equity, and that the said defendant may answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by your orator, and that the said defendant, its agents, servants, and attorneys, and all persons acting in aid of them or either of them, be enjoined and restrained from further prosecuting, as against your orator, either of the said actions so brought by it in the said Superior Court of the County of Mono, State of California, and from taking any further step whatsoever in either of said actions as against your orator, and that your orator may have such further or other relief as the nature of the case may require, and to your Honors may seem meet.

May it please your Honors to grant unto your orator a writ of subpœna, to be directed to said defendant, the Rickey Land and Cattle Company, a corporation, commanding it, at a certain time and under a certain penalty therein to be limited, personally to appear before this Honorable Court, and then and there full, true, direct and perfect answer make to all and singular the premises, and further, to stand to, perform, and abide such further order, direction and decree therein as to this Honorable Court shall seem meet.

18 And may it further please your Honors, during the pendency of this suit, to issue your writ of injunction enjoining and restraining the said defendant, its agents, servants and attorneys, and all persons acting in aid of them or either of them, during the pendency of this suit, and until the further order of the Court, from further prosecuting, as against your orator, either of the said actions so brought by it in the said Superior Court of the County of Mono, State of California, and from taking any further step whatsoever in either of said actions as against your orator.

And may it further please your Honors to make and issue an order requiring the said defendant, the Rickey Land and Cattle Company, to show cause before this Honorable Court, at a time and place therein fixed, why such writ of injunction, pendente lite, as above prayed for, should not be issued, and, at the same time, and as a part of such order, to issue your temporary restraining order enjoining and restraining the said defendant, its agents, servants and attorneys, and all persons acting in aid of them or either of

them, until the hearing of such order to show cause, and
19 until the further order of this Court, from doing all or any of the acts aforesaid.

[SEAL.] MILLER & LUX, *Complainant,*
By J. LEROY NICKEL,
Vice-President,
DAVID BROWN, *Secretary.*

W. C. VAN FLEET,
W. B. TREADWELL,
Solicitors for Complainant.
ISAAC FROHMAN,
Of Counsel for Complainant.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

J. Leroy Nickel, being duly sworn, upon his oath deposes and says: That he is the vice-president of Miller & Lux, a corporation, the complainant above named; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief; and that as to those matters he believes the same to be true.

J. LEROY NICKEL.

20 Subscribed and sworn to before me this 3d day of January, 1905.

[NOTARIAL SEAL.] GEO. T. KNOX,
Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed:] No. 791. In Equity. In the Circuit Court of the United States for the District of Nevada. Miller & Lux, Complainants, v. Rickey Land & Cattle Company, Defendant. Bill of Complaint. Filed January 4th, 1905. T. J. Edwards, Clerk. W. C. Van Fleet and W. B. Treadwell, Mills Building, San Francisco, Cal., Solicitors for Complainant.

In the Circuit Court of the United States, for the District of Nevada.

No. 791.

MILLER & LUX (a Corporation), Complainant,
vs.
THE RICKEY LAND AND CATTLE COMPANY, (a Corporation), Defendant.

Order to Show Cause Why Injunction Pendente Lite Should Not Issue.

Good cause appearing therefor, by the verified bill of
21 complaint of Miller & Lux, a corporation, complainant, on file herein, it is ordered that the said defendant, the Rickey

Land and Cattle Company, a corporation, show cause before this Court on the 13th day of March, 1905, at the hour of ten o'clock A. M., at the courtroom of this Court at Carson City, Nevada, why an injunction should not issue pending this suit, according to the prayer of said bill.

And it further appearing to the Court that there is danger of irreparable injury from delay, it is therefore further ordered that, until the hearing and determination of said motion for injunction, and until the further order of this Court, the said defendant, the Rickey Land and Cattle Company a corporation, its agents, servants and attorneys, and all persons acting in aid of them or either of them, be and they are hereby enjoined and restrained from further prosecuting, as against said complainant, either of the two certain actions brought on the 15th day of October, 1904, by the said Rickey Land and Cattle Company, as plaintiff, against the said Miller & Lux, a corporation, and others, as defendants, in the Superior Court of the County of Mono, State of California, and respectively numbered on the register of said Superior Court 1055 and 1056.

And it is further ordered that, before said restraining order takes effect, the said complainant file in this Court a bond, ap-
22 proved by a judge of this Court, in the sum of ten thousand dollars ($10,000), conditioned according to law.

And it is further ordered that a copy of this order be served upon the said corporation defendant, and on one of its attorneys (namely, on either Mr. James F. Peck or Mr. Charles C. Boynton, or Mr. William O. Parker), on or before the 30th day of January, 1905.

THOMAS P. HAWLEY, *Judge.*

[Endorsed:] No. 791. Circuit Court of the United States for the District of Nevada. Miller & Lux, Complainant, vs. Rickey Land & Cattle Company, Defendant. Order to Show Cause why Injunction Pendente Lite should not Issue. Filed January 4th, 1905. T. J. Edwards, Clerk.

Subpœna ad Respondendum.

DISTRICT OF NEVADA, *ss:*

The President of the United States of America, to The Rickey Land and Cattle Company, a Corporation, Greeting:

You are hereby commanded that you personally appear before the Judges of the Circuit Court of the United States for the District of Nevada, in the Ninth Judicial Circuit, on the 6th day of February, 1905, to answer unto a bill of complaint exhibited
23 against you in said court by Miller & Lux, a corporation; and to do further and receive whatever said court shall have considered in that behalf; and this you are not to omit under the penalty of two hundred and fifty dollars.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of said Circuit Court hereunto affixed,

at Carson City, Nevada, on this 4th day of January, 1905, and of the year of the Independence of the United States the 129th.

Attest:

T. J. EDWARDS, *Clerk*.

W. C. VAN FLEET,
W. B. TREADWELL,
Solicitors for Complainant.
ISAAC FROHMAN,
Of Counsel for Complainant.

MEMORANDUM: The defendant is to enter its appearance in the above-mentioned suit, in the clerk's office at Carson City, Nevada (Federal Building), on or before the day at which the above subpœna is returnable, otherwise the bill may be taken pro confesso.

T. J. EDWARDS, *Clerk*.

24 United States Circuit Court, District of Nevada.

791.

MILLER & LUX (a Corp'n)
vs.
THE RICKEY LAND AND CATTLE COMPANY (a Corp'n).

Return.

I certify and return that I received the within and hereto annexed subpœna to appear and answer complainant's bill, on the 4th day of January, 1905, together with a certified copy of order to show cause; also certified copy of complaint, in the above-entitled case, and personally executed same on Thos. B. Rickey at Carson City, Nevada, on the 5th day of January, 1905, by exhibiting to the said Thos. B. Rickey the original of said subpœna, and leaving in his possession a copy thereof, together with said certified copy of order to show cause and also said certified copy of complaint.

Dated Carson City, Nevada, January 5, 1905.

ROBERT GRIMMON,
U. S. Marshal.

Fees—2 services, $8.00.

[Endorsed:] No 791. U. S. Circuit Court, District of
25 Nevada. Miller & Lux, a corporation, vs. The Rickey Land and Cattle Company, a corporation. Subpœna to Appear and Answer Complainant's Bill. Filed on return, January 5th, 1905. T. J. Edwards, Clerk.

In the Circuit Court of the United States for the District of Nevada.

In Equity. No. 791.

MILLER & LUX (a Corporation), Complainant,
vs.
THE RICKEY LAND AND CATTLE COMPANY (a Corporation), Defendant.

THE PACIFIC LIVESTOCK COMPANY (a Corporation), Complainant,
vs.
THE RICKEY LAND AND CATTLE COMPANY (a Corporation), and MILLER & LUX (a Corporation), Defendants.

Supplemental Bill of Pacific Livestock Company.

To the Judges of the Circuit Court of the United States for the District of Nevada:

The Pacific Livestock Company, a corporation organized
26 and existing under the laws of the State of California, and having its principal place of business at San Francisco, California, and a citizen of the State of California, brings this its bill against the Rickey Land and Cattle Company, a corporation organized and existing under the laws of the State of Nevada, and having its principal place of business at Carson City, in the County of Ormsby, State of Nevada, and within the District of Nevada, and a citizen of the State of Nevada, and against Miller & Lux, a corporation organized and existing under the laws of the State of California, and having its principal place of business at San Francisco, California, and a citizen of the State of California, and thereupon your orator complains and says:

1. That your orator is, and ever since the 23d day of January, 1888, has been, a corporation organized and existing under the laws of the State of California, and has its principal place of business at San Francisco, in the State of California, and is a citizen of the State of California.

2. That the defendant, the Rickey Land and Cattle Company, is a corporation organized and existing under the laws of the State of Nevada, and has its principal place of business at Carson City, in the County of Ormsby, in the State of Nevada, and within said District of Nevada, and is a citizen of the State of Nevada.

27 3. That the defendant Miller & Lux is, and ever since the 5th day of May, 1897, has been, a corporation organized and existing under the laws of the State of California, and has its principal place of business at San Francisco, in the State of California, and is a citizen of the State of California.

4. That, on the 10th day of June, 1902, the said Miller & Lux, as complainant, exhibited to and filed in this court its bill of complaint against one Thomas B. Rickey and against many other persons; which suit is numbered 731 on the equity docket of this court.

5. That thereafter, on the said 10th day of June, 1902, this court duly issued its writ of subpœna in said suit upon said bill of complaint, directed to the said Thomas B. Rickey and the other persons made defendants by said bill; and thereafter, on the said 10th day of June, 1902, the said writ of subpœna was duly served by the marshal of this district upon the said Thomas B. Rickey, and was thereafter served upon the other defendants in said suit.

6. That thereafter the said Thomas B. Rickey entered his appearance in said suit, and thereafter filed in this court his plea to the jurisdiction of said court, which plea was overruled by this Court, and the said Thomas B. Rickey was by this Court ruled to answer to said bill of complaint; and he has answered the same.

28 7. That the other defendants in said suit have entered appearances in said suit; and the said suit is now pending and undetermined in this court as to all of defendants thereto.

8. That in and by the said bill of complaint, the said Miller & Lux (complainant therein) alleged, among other things, that it then was, and for a long time prior thereto had been, the owner and seised in fee and in the actual possession of certain lands situated in the County of Lyon, State of Nevada, in said District of Nevada, in said bill particularly enumerated and described; and further alleged that there is a certain natural stream and watercourse known as Walker River, which flows, and from time immemorial has flowed, to, over, upon, and through the said lands, and that said lands include the banks, bed and stream of said river; and further alleged that, at divers times therein set forth, the said Miller & Lux, its grantors and predecessors in interest, had first appropriated and diverted from said river portions of the waters of said river, amounting in all to a flow of nine hundred and forty-three and twenty-nine hundredths (943.29) cubic feet of water per second, and that it and they had carried the same from said river to and upon certain lands and used the same for the irrigation thereof, and that the said Miller & Lux was then the owner by such appropriation of certain interests in said appropriated water therein particu-

29 larly set forth and enumerated; and further alleged that, within three years next before the filing of said bill, the defendants thereto, including the said Thomas B. Rickey, had, and that each of them had, diverted the waters of said Walker River at divers places on said river above the said lands of the said Miller & Lux, and above the points at which the said Miller & Lux so diverts said water, and that a large portion of said water so diverted by the defendants in said suit is never returned to said river, and that said defendants to said suit are continuing the diversions aforesaid, and have thereby deprived and are depriving the said Miller & Lux of a large portion of said water to which the said Miller & Lux is so entitled; and further alleged that each of said diversions so made by the defendants to said suit is without right, but that they have so diverted said water, and are so diverting the same, under claim of right so to do, and adversely to the said Miller & Lux; and further alleged that, by the diversions aforesaid, the said Miller &

Lux has been deprived and is being deprived of sufficient water to irrigate its lands aforesaid, and is thereby rendered unable, and so long as said diversions are continued will be unable, to irrigate its said lands which it had theretofore been accustomed to irrigate, and is thereby rendered unable and will be unable to properly or
30 successfully cultivate the said lands or to raise crops thereon; and further alleged that, if the defendants to said suit, or either of them, has any right to divert any water from the said river, such rights and each of them are subsequent and subordinate to the aforesaid appropriations so made by the said Miller & Lux, and its grantors and predecessors in interest; and further alleged that the matter in dispute in said suit, to wit, the said rights of the said Miller & Lux so infringed by the said acts of the defendants to said suit, exceeds, exclusive of interest and costs, the value of two thousand dollars ($2,000).

9. That, in and by the said bill of complaint, the said Miller & Lux, among other things, prayed that the defendants to said suit, including the said Thomas B. Rickey, be forever enjoined and restrained from diverting any water from the said Walker River, above the points where the said Miller & Lux so diverts the same, in such manner or to such extent as to deprive the said Miller & Lux of any of the water aforesaid, and also for general relief.

10. That thereafter, to wit, on the 4th day of January, 1905, the said Miller & Lux, as complainant, exhibited to and filed in this court its bill of complaint in this suit against the said defendant the Rickey Land and Cattle Company; and thereafter, on the said 4th day of January, 1905, this court duly issued its writ of
31 subpœna in this suit upon said bill of complaint directed to the said Rickey Land and Cattle Company, and thereafter the said writ of subpœna was duly served by the marshal of this district upon the said Rickey Land and Cattle Company, and the said Rickey Land and Cattle Company thereafter appeared in this suit; and this suit is now pending and undetermined in this court.

11. That, in and by its bill of complaint in this suit, the said Miller & Lux alleged, among other things, the matters and things aforesaid; and further alleged that, on the 6th day of August, 1902, and after the filing of the said bill of complaint number 731, and after the service upon the said Thomas B. Rickey of the writ of subpœna in said suit, and after the said Thomas B. Rickey had appeared therein, the said Thomas B. Rickey caused the said Rickey Land and Cattle Company to be organized and incorporated, and it was, on that day, organized and incorporated under the laws of the State of Nevada; and further alleged that the only person really interested in said corporation Rickey Land and Cattle Company, or really owning any of the stock thereof, is the said Thomas B. Rickey, and that the other persons forming the said corporation and holding the stock thereof are only nominees of the said Thomas B. Rickey, and hold their said stock solely for him and for his benefit;
32 and further alleged that the said Thomas B. Rickey, at the time of the commencement of the suit aforesaid, was the owner and had, for a long time theretofore, been the owner of certain

lands situated on the said Walker River, and on certain branches or tributaries thereof, and was diverting certain water from the said Walker River, and from the said branches and tributaries thereof, for the irrigation of his said lands and claiming the right so to do; and further alleged that after the said incorporation and organization of the said Rickey Land and Cattle Company the said Thomas B. Rickey conveyed to said corporation all his lands aforesaid, and all the rights owned or claimed by him to divert any water from the said Walker River; and the said Rickey Land and Cattle Company has ever since claimed to be the owner of said lands and water rights; and further alleged that thereafter, to wit, on the 15th day of October, 1904, the said Rickey Land and Cattle Company commenced an action in the Superior Court of the County of Mono, State of California, against the said Miller & Lux and against a large number of other persons, which action is numbered 1055 on the register of said Superior Court; and further alleged that said action was commenced by said Rickey Land and Cattle Company, as plaintiff therein, by the filing of a complaint, in and by which the said

Rickey Land and Cattle Company (plaintiff therein) alleged,
33 among other things, that it is, and had been since the 6th day of August, 1902, the owner in possession, and entitled to the possession of certain of the lands aforesaid so conveyed to it by the said Thomas B. Rickey, and that the said lands constituted one entire contiguous body of land, over, through and upon which flows, and from time immemorial has flowed, a certain branch or tributary of said Walker River called the West Fork of the Walker River, and that said lands and all thereof are, and from time immemorial have been, riparian to said West Fork of said river, and situated along and bordering thereupon, and that the said Rickey Land and Cattle Company (plaintiff therein) is the owner, in the possession of, and entitled to the possession, use and enjoyment of, and has the right to divert and appropriate all the waters of the said West Fork of said Walker River and its tributaries in the State of California, to the extent of a constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second, and that the said Walker River is, and from time immemorial has been, a natural stream or watercourse having its source in two branches known as the East Fork of the Walker River, and the West Fork of the Walker River, and that both of said branches have their source in the State of

California, and from thence flow through the eastern part of
34 said State of California into and through the western part of the State of Nevada, and that said two branches of said Walker River unite in said State of Nevada, and that the defendants in said action, and each of them, including the said Miller & Lux, claim some right, title and interest adverse to the said Rickey Land and Cattle Company (plaintiff therein) in and to said constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second, or some part or portion thereof, in the West Fork of the Walker River; that said right, title and interest so claimed by said defendants, and each of them, including the said Miller & Lux, in and to said water is without right, and that all claims of them, and

each of them, to the waters of said West Fork of said Walker River are subordinate and subject to the said alleged ownership of the said Rickey Land and Cattle Company (plaintiff therein), and its alleged right to divert and appropriate from said West Fork of said Walker River a constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second; and further alleged that, in and by said complaint, the said Rickey Land and Cattle Company (plaintiff therein) prayed, among other things, that the said Superior Court should adjudge that the said Rickey Land and Cattle Company (plaintiff therein) is the owner, in the possession, use, en-
35 joyment, and entitled to the possession, use and enjoyment of, and has the right to appropriate and divert all the waters of the said West Fork of the said Walker River in the State of California, to the extent of a constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second; and that said Court further adjudge that neither of the defendants therein, including the said Miller & Lux, has any right, title, interest, claim, or estate in or to any of the waters flowing, or which may hereafter flow, in the said West Fork of the said Walker River, in the State of California, when the quantity of water therein flowing is less than fifteen hundred and seventy-five (1575) cubic feet of water per second, and that it be further adjudged that the said defendants, and each of them, including the said Miller & Lux, are estopped to claim or assert against the said Rickey Land and Cattle Company (plaintiff therein), its grantees, successors, or assigns, any right, title, claim, interest, or estate in or to any of the waters now flowing, or which may hereafter flow, in said West Fork of the said Walker River in the State of California when the quantity of water therein flowing is less than fifteen hundred and seventy-five (1575) cubic feet of water per second, and also for general relief; and further alleged that, upon the filing of said complaint in said Superior Court, there was issued out of said court its writ of summons thereupon,
36 which is the appropriate process under the laws of the State of California for obtaining jurisdiction over the persons of the defendants in an action; and that thereafter, to wit, on the 22d day of October, 1904, the said writ of summons was served upon the said Miller & Lux; and further alleged that on the said 15th day of October, 1904, the said Rickey Land and Cattle Company, as plaintiff, commenced another action in said Superior Court of said County of Mono, State of California, against the said Miller & Lux and against a large number of other persons, which action is numbered 1056 on the register of said court; and further allege that said action was commenced by the said Rickey Land and Cattle Company, as plaintiff therein, by the filing of a complaint, in and by which the said Rickey Land and Cattle Company (plaintiff herein) alleged, among other things, that it is, and has been since the 6th day of August, 1902, the owner, in possession and entitled to the possession of the rest of the lands aforesaid so conveyed to it by the said Thomas B. Rickey, and that the said lands constituted one entire contiguous body of land, over, through and upon which flows, and from time immemorial has flowed, a certain branch or tributary of said Walker

River, called the East Fork of the Walker River, and that said lands and all thereof are, and from time immemorial have been, riparian to said East Fork of said river,
37 and situated along and bordering thereupon, and that the said Rickey Land and Cattle Company (plaintiff therein) is the owner, in the possession of, and entitled to the possession, use, and enjoyment of, and has the right to divert and appropriate all the waters of the said East Fork of said Walker River and its tributaries in the State of California, to the extent of a constant flow of five hundred and four (504) cubic feet of water per second, and that the said Walker River is, and from time immemorial has been, a natural stream or watercourse having its source in two branches known as the East Fork of the Walker River, and the West Fork of the Walker River, and that both of said branches have their source in the State of California, and from thence flow through the eastern part of the said State of California into and through the western part of the State of Nevada, and that said two branches of said Walker River unite in said State of Nevada, and that the defendants in said action, and each of them, including the said Miller & Lux, claim some right, title and interest, adverse to said Rickey Land and Cattle Company (plaintiff therein) in and to said constant flow of five hundred and four (504) cubic feet of water per second, or some part or portion thereof, in the East Fork of the Walker River, that said right, title and interest, so claimed by said defendants and each of them, including the said Miller &
38 Lux, in and to said water is without right, and that all claims of them and each of them to the waters of said East Fork of said Walker River are subordinate and subject to the said alleged ownership of the said Rickey Land and Cattle Company (plaintiff therein), and its alleged right to divert and appropriate from said East Fork of said Walker River a constant flow of five hundred and four (504) cubic feet of water per second; and further alleged that, in and by said complaint, the said Rickey Land and Cattle Company (plaintiff therein) prayed, among other things, that the said Superior Court should adjudge that the said Rickey Land and Cattle Company (plaintiff therein) is the owner, in the possession, use, enjoyment, and entitled to the possession, use, and enjoyment of, and has the right to appropriate and divert all the waters of the said East Fork of the said Walker River in the State of California, to the extent of a constant flow of five hundred and four (504) cubic feet of water per second, and that said Court further adjudge that neither of the defendants therein, including the said Miller & Lux, has any right, title, interest, claim or estate in or to any of the waters flowing or which may hereafter flow in the said East Fork of the said Walker River, in the State of California, when the quantity of water therein flowing is less than five hundred and four (504) cubic feet of water per second, and that it be further adjudged that the
39 said defendants and each of them, including the said Miller & Lux, are estopped to claim or assert against the said Rickey Land and Cattle Company (plaintiff therein), its grantees, successors, or assigns, any right, title, claim, interest or estate in or to

any of the waters now flowing, or which may hereafter flow, in said East Fork of said Walker River in the State of California, when the quantity of water therein flowing is less than five hundred and four (504) cubic feet of water per second, and also for general relief; and further alleged that, upon the filing of said complaint in said Superior Court, there was issued out of said court its writ of summons thereupon, which is the appropriate process under the laws of the State of California, for obtaining jurisdiction over the persons of the defendants in an action, and that thereafter, to wit, on the 22d day of October, 1904, the said writ of summons was served upon the said Miller & Lux; and further alleged by the laws of the State of California, an action is commenced in the courts of that State merely by the filing of a complaint, and that from and after the filing of such complaint such action is deemed to be pending in the court in which such complaint is filed; and further alleged that the issues tendered by said complaints in said two actions so brought by the said Rickey Land and Cattle Company, as plaintiff, against
40 the said Miller & Lux, and said other persons, are, so far as concerns the said Miller & Lux, the same issues which were tendered by the said bill of complaint of the said Miller & Lux, number 731, so filed in this court, so far as the same related to the defendant, Thomas B. Rickey, in said suit; and further alleged that, at the time of the filing by the said Rickey Land and Cattle Company of its complaints aforesaid, the said Rickey Land and Cattle Company did not have or claim to have, and does not now have, or claim to have, any right whatever in or to any of the waters of said Walker River, or of any branch or tributary thereof, except such rights, if any, as it acquired by said conveyance to it from the said Thomas B. Rickey; and further alleged that the said Rickey Land and Cattle Company, in and by the actions aforesaid, intended, and the necessary effect of said actions is, to bring on for trial and determination in said Superior Court the same issues presented by the said bill of complaint of the said Miller & Lux in the said suit, number 731, so brought by it in this court, so far as relates to the issues between the said Miller & Lux and the said Thomas B. Rickey, and to obtain from said Superior Court a judgment determining said issues in advance of a determination of the same by this court, and thereby to defeat the jurisdiction of this court in the said suit now pending before it, and to hinder and embarrass this court in
41 the trial of said issues, and in the enforcement of any decree which this court may render in the said suit, number 731, so pending before it, and that further prosecution, of said actions, or either of them, as against the said Miller & Lux, would therefore be in derogation of the jurisdiction of this court and of the rights of the said Miller & Lux in the suit, number 731, so brought by it in this court, and now pending therein; and further alleged that the matter in dispute in this suit, to wit, the right of said Miller & Lux, to maintain its said suit, number 731, without hindrance from, or interference by any other court, exceeds, exclusive of interest and costs, the sum of two thousand dollars ($2,000).

12. That, in and by its said bill of complaint in this suit, the said

Miller & Lux, complainant therein, prayed, among other things, that the said Rickey Land and Cattle Company, its agents, servants, and attorneys, and all persons acting in aid of them or either of them, should be enjoined and restrained from prosecuting, as against the said Miller & Lux, either of the said actions so brought by it in the said Superior Court of the County of Mono, State of California, and from taking any further step whatsoever in either of said actions as against the said Miller & Lux, and also for general relief; and further prayed that, during the pendency of this suit, this court
42 should grant its writ of injunction pendente lite to restrain any and all of the acts aforesaid, and to make and issue an order requiring the said Rickey Land and Cattle Company to show cause why such writ of injunction pendente lite should not be issued, and to issue a temporary restraining order restraining all or any of the acts aforesaid during the hearing of such order to show cause, and until the further order of this Court.

13. That, on said 12th day of June, 1905, the said Miller & Lux, by its good and sufficient deed of grant, bargain, and sale, granted and conveyed to your orator, the said Pacific Livestock Company, all of the lands aforesaid, and all its water rights and appropriations aforesaid, and all its ditches, flumes, and waterways used in connection with the same, and all its cause and causes of suit complained of in said bill number 731, and all its right to the relief prayed for in said bill number 731, and your orator has ever since been and now is the owner of all of said property and rights.

14. That the matter in dispute in this suit, to wit, the aforesaid rights of said Miller & Lux and of your orator so infringed by the aforesaid acts of the said Rickey Land and Cattle Company, exceeds, exclusive of interest and costs, the value of two thousand dollars ($2,000); and the matter in dispute in this supplemental bill, to wit, the right of your orator to have the benefit of all the
43 pleadings and proceedings in this suit heretofore had and taken, exceeds, exclusive of interest and costs, the value of two thousand dollars ($2,000).

And your orator alleges that all of the said acts, doings, and claims of the said Rickey Land and Cattle Company are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your orator and the said Miller & Lux in the premises. In consideration whereof, and forasmuch as your orator is remediless in the premises, at and by the strict rules of the common law, and can have relief only in a court of equity, where matters of this kind are properly cognizable and relievable, to the end therefore that your orator may have that relief which it can obtain only in a court of equity, and that the said defendants may answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by your orator, and that the said defendant the said Rickey Land and Cattle Company, its agents, servants, and attorneys, and all persons acting in aid of them or either of them, be enjoined and restrained from prosecuting, as against your orator or as against the said Miller & Lux, either of the said actions so brought by it in the said Superior Court of the County of Mono, State of California, and from taking

any steps whatsoever in either of said actions as against your orator or as against the said Miller & Lux, and that your orator may
44 be admitted as a party complainant in the above-entitled suit, together with the said Miller & Lux, and that your orator may also have for itself the relief against the said Rickey Land and Cattle Company prayed for in this suit, and that your orator may have all benefit and advantage of all the pleadings and proceedings in this suit, in the same manner and to the same extent as if your orator had originally been one of the complainants therein, and that this bill may be taken as supplemental to the original bill in this suit, and that your orator may have such further or other relief as the nature of the case may require, and to your Honors may seem meet.

May it please your Honors to grant unto your orator a writ of subpœna, to be directed to said defendants, the Rickey Land and Cattle Company, a corporation, and Miller & Lux, a corporation, commanding them, at a certain time and under a certain penalty therein to be limited, personally to appear before this Honorable Court, and then and there full, true, direct, and perfect answer make to all and singular the premises, and further, to stand to, perform, and abide such further order, directions, and decree therein as to this Honorable Court shall seem meet.

And may it further please your Honors, during the pend-
45 ency of this suit, to issue your writ of injunction, enjoining and restraining the said Rickey Land and Cattle Company, its agents, servants, and attorneys, and all persons acting in aid of them or either of them, during the pendency of this suit, and until the further order of the Court, from prosecuting, as against your orator or as against the said Miller & Lux, either of the said actions so brought by it in the said Superior Court of the County of Mono, State of California, and from taking any step whatsoever in either of said actions as against your orator or as against the said Miller & Lux.

And may it further please your Honors to make and issue an order requiring the said Rickey Land and Cattle Company to show cause before this Honorable Court, at a time and place therein fixed, why said writ of injunction, pendente lite, as above prayed for, should not be issued; and, at the same time, and as a part of such order, to issue your temporary restraining order enjoining and restraining the said Rickey Land and Cattle Company, its agents, servants and attorneys, and all persons acting in aid of them or either of them, until the hearing of such order to show cause, and until the
46 further order of this Court, from doing all or any of the said aforesaid.

PACIFIC LIVESTOCK COMPANY,
Complainant,
By J. LEROY NICKEL, *Vice-President.*

[CORPORATE SEAL.]

C. Z. MERRITT, *Secretary.*
W. C. VAN FLEET,
W. B. TREADWELL,
Solicitors for Complainant.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

J. Leroy Nickel, being duly sworn, deposes and says: That he is the vice-president of the Pacific Livestock Company, corporation complainant above named; that he has read the foregoing supplemental bill of complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief; and that as to those matters he believes the same to be true.

J. LEROY NICKEL.

Subscribed and sworn to before me this 3d day of August, 1905.
[NOTARIAL SEAL.] GEO. T. KNOX,
Notary Public in and for City, County, and State Aforesaid.

47 [Endorsed:] No. 791. In Equity. In the Circuit Court of the United States, for the District of Nevada. Miller & Lux, a Corporation, Complainant, v. Rickey Land & Cattle Company, a Corporation, Defendant. Supplemental Bill of Pacific Livestock Company. Filed by leave of court, August 7th, 1905, T. J. Edwards, Clerk. W. C. Van Fleet and W. B. Treadwell, Mills Bldg., San Francisco, Cal., Solicitors for Pacific Livestock Company.

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

No. 791.

MILLER & LUX (a Corporation), Complainant,
vs.
THE RICKEY LAND AND CATTLE COMPANY (a Corporation), Defendant.

Affidavit of Thomas B. Rickey.

STATE OF NEVADA,
County of Ormsby, ss:

Thomas B. Rickey, being duly sworn, deposes and says: That he is one of the defendants in the bill of complaint in the action commenced herein, No. 731, wherein Miller & Lux, a corporation, is complainant, and Thomas B. Rickey and others are defend-
48 ants; and that he is and since its organization has been the President of the Rickey Land & Cattle Company, a corporation, defendant herein; that he is not now, nor has he at any time since the organization of said corporation, been the manager of said corporation; that the manager of said corporation is, and at all times since the organization has been, one Charles Rickey, and that the active management of the said corporation and its affairs has been conducted by the said Charles Rickey.

It is provided by the laws of the State of California in Section 738 of the Code of Civil Procedure of said State, as follows:

"An action may be brought by any person against another who claims an estate or interest in real property, adverse to him, for the purpose of determining such adverse claim; provided, however, that whenever in an action to quiet title to, or to determine adverse claims to, real property, the validity of any gift, devise, or trust, under any will, or instrument purporting to be a will, whether admitted to probate or not, shall be involved, such will, or instrument purporting to be a will, is admissible in evidence; and all questions concerning the validity of any gift, devise or trust therein contained, save such as under the constitution belong exclusively to the probate jurisdiction, shall be finally determined in such action; and provided, however, that nothing herein contained shall be construed to deprive a party of the right to a jury trial in any case where, by the law, such right is now given."

That under the laws of the State of California, a person or corporation may commence and prosecute an action to final judgment in the Superior Court of said State, to quiet and determine his or its title to real estate and water, and the use of water, flowing in the streams in said state, against any person or corporation claiming an adverse interest or title to such real estate, or to such water, or to such use of water.

That the Rickey Land and Cattle Company, a corporation, was organized on the 24th day of July, 1902, by Thomas B. Rickey, the affiant, Charles W. Rickey and Alice B. Rickey, who were the incorporators and subscribers to the capital stock of said corporation; and the said corporation was not organized on the 6th day of August, 1902, by the affiant, and was at no time organized by the affiant, except in so far as he participated with those associated with him in the organization of said corporation. That the purposes for which said Rickey Land and Cattle Company was organized were, "To buy and sell and own and to reclaim farm and graze lands; to locate and buy and sell water and water rights; and to use the same for irrigation and mechanical purposes; to build and construct dams and reservoirs and to store water therein for the purposes of irrigation and distribution and sale; to buy and sell and raise all kinds of livestock, hay and grain and to do all kinds of farming business and to engage in all kinds of agricultural and dairy pursuits and business, and to engage in and to do a general merchandizing business, all in the States of California, Nevada, and elsewhere." That pursuant to the purposes expressed in said articles of incorporation the said corporation acquired by conveyance certain lands and certain water rights of said Thomas B. Rickey, the affiant, on the 6th day of August, 1902, part of which said lands are described in the complaints in said suits commenced in said Mono County, referred to in the complaint herein

That the said Rickey Land and Cattle Company acquired by conveyance from said Thomas B. Rickey all his rights, title and interest to certain water rights, and rights to the use of water; and said water rights, and rights to the use of water are in part the water rights,

and rights to the use of water described and mentioned in the said complaints in said actions commenced in Mono County; but the said water rights so acquired by the said Rickey Land and Cattle Company from the said Thomas B. Rickey are not the same rights to water and rights to the use of water alleged in said complaints in said Mono County in this, that since the conveyance of said
51 lands by Thomas B. Rickey, and said water rights, and the right to the use of water to said Rickey Land and Cattle Company, which conveyance was made, executed and delivered on the 6th day of August, 1902, the Rickey Land and Cattle Company has at all times appropriated and diverted the water described in the said complaints in said actions commenced in said Mono County for a beneficial purpose, and has used the same for a beneficial purpose, and has diverted, appropriated and used such water adversely to all the world, and under a claim of right so to do, and has so diverted, appropriated and used such water continuously, uninterruptedly, notoriously, adversely, exclusive and peaceably.

That under the laws of the State of California, the adverse possession and use of water for a period of five years by the person or corporation claiming the right to said water, and its grantors and predecessors in interest, confers a title and right to the continued use of said water.

By the laws of the State of California it is provided:

"Occupancy for any period confers a title sufficient against all except the State and those who have title by prescription, accession, transfer, will, or succession.

52 Occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar an action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all."

That Charles Rickey is now, and ever since the organization of said corporation has been the owner of, and entitled to all the rights, privileges and profits growing out of one hundred shares of the capital stock of said Rickey Land and Cattle Company; and that Alice B. Rickey is now, and ever since the organization of said corporation has been, the owner of, and entitled to all the rights, privileges and profits growing out of one hundred shares of the capital stock of said Rickey Land and Cattle Company. That each of said persons, Charles Rickey and Alice B. Rickey, became owners of said stock by subscription to the capital stock of said corporation. That said Charles Rickey and Alice B. Rickey are, and at all times since the organization of said corporation, have been, in the absolute control of said stock, free from any right by interference, management or direction of the said Thomas B. Rickey, affiant herein. And the said Charles Rickey and Alice B. Rickey have, and at all times since the organization of said corporation have had, the right to receive, and have received, all the profits earned by said stock so owned and held by them for their own use, benefit and enjoy-
53 ment, and are subject therein to all burdens and liabilities attaching to the ownership of said stock. That the said Thomas B. Rickey, affiant herein, has no interest whatever, legal

or equitable, in the said stock so owned and held by said Charles Rickey and said Alice B. Rickey. That the value of said stock so owned and held by said Charles Rickey and said Alice B. Rickey is about forty thousand dollars.

That the Rickey Land and Cattle Company, a corporation, mentioned in the complaint herein, is not a defendant in the original complaint filed in that certain action, No. 731, referred to in the complaint herein, wherein Miller & Lux is complainant, and affiant and others, are defendants; nor has the said corporation been made a party by any order of this Court.

Affiant denies and says that it is not true that the only person really or at all interested in said corporation, the Rickey Land and Cattle Company, or really, or otherwise, owning any of the stock thereof, is the said affiant, Thomas B. Rickey. And denies and says it is not true that the persons, other than Thomas B. Rickey, affiant, forming the said corporation, the Rickey Land and Cattle Company, or holding the stock thereof, are only nominees of the said Thomas B. Rickey, or that they hold their said stock solely, or at all, for him, or for his benefit.

54 That in the complaints in the actions commenced in Mono County, State of California, as alleged in the complaint herein, it is not alleged that the lands described in said complaints, or any of them were conveyed to the plaintiff in said actions by the said Thomas B. Rickey, nor is any reference therein had to any conveyance or transfer by said Thomas B. Rickey, to the said plaintiff in said action.

Affiant denies and says that it is not true that the issues, or any issue, tendered by said complaints in said two actions, or either of them, brought by the defendant, the Rickey Land and Cattle Company herein, as plaintiff in said actions, against the complainant herein, are, so far as concerns complainant herein, the same issues, or any issue, which were tendered by the bill mentioned in the complaint herein so filed in this court.

Affiant denies that at the time of filing by the defendant, the Rickey Land and Cattle Company, herein, of its complaints in the Superior Court of said County of Mono, State of California, or at any other time, the said defendant, the Rickey Land and Cattle Company, did not have or claim to have, or does not now have or claim to have, any right in or to any of the waters of said Walker River, or of any branch or tributary thereof, except such right or rights, if any, as was acquired by said Rickey Land and

55 Cattle Company by said conveyance alleged in the complaint herein to have been made to it from the said Thomas B. Rickey, affiant.

Denies and says that it is not true that the defendant herein, Rickey Land and Cattle Company, in and by the actions, or either of them, commenced in the said Superior Court of the County of Mono, State of California, intended, or that the necessary, or any, effect of said actions, or either of them, is to bring on for trial or determination in said Superior Court, the same issues, or any issue, presented by said bill of complaint filed by the complainant herein

in the said action, No. 731, wherein Miller & Lux is complainant and the said affiant and others are defendants.

And denies and says it is not true that the defendant herein, Rickey Land and Cattle Company, intended, and that the necessary, or any, effect of said actions commenced in said Superior Court of Mono County, is to obtain from said Superior Court a judgment determining the issues, or any of them, presented by the said bill of complaint in said action No. 731, in advance of a determination of the same by this Court, or to do anything else therein, or to cause any other action to be taken by said Court for the purpose of defeating, or which will defeat, the jurisdiction of this Court in the said suit alleged in complainant's complaint.

56 And the said affiant denies and says that it is not true that the defendant herein, Rickey Land and Cattle Company, intended, and that the necessary, or any, effect of said actions, or either of them, so commenced in the Superior Court of Mono County, is to hinder or embarrass, or will hinder or embarrass, or that any action of said defendant in said Superior Court of Mono County, or any action of said Superior Court of Mono County in said actions, or either of them, will hinder or embarrass this Court in the trial of the issues, or any of them, in said suit, or in the enforcement of any decree which this Court may render in the said suit so pending before it.

And denies and says that it is not true that the further prosecution of said actions, or either of them, as against the complainant herein would be in derogation of the jurisdiction of this Court, or of the rights, or any right, of the complainant in the suit alleged in the complaint herein.

And in this behalf affiant alleges that the said actions so commenced in Mono County, and each of them, are brought in good faith, regardless of any effect they may have upon the said suit of Miller & Lux vs. T. B. Rickey and others, No. 731, in this cause, for the purpose of having and procuring a judgment quieting the title of said Rickey Land and Cattle Company to the said waters, water rights, and the use of the waters described in said

57 complaints in said actions commenced in Mono County, State of California, and are so brought at this time because the said Rickey Land and Cattle Company, and its officers, deem such action prudent and necessary, because of the old age and infirmity of many of the witnesses whose testimony is necessary to establish the rights of said Rickey Land and Cattle Company to the said waters, and rights to the waters, and rights to the use of waters described in said complaints in said actions commenced in Mono County, State of California, as against the defendants in said suits, and because the relief sought in said actions so commenced in the Superior Court of Mono County, cannot be obtained in any other court.

Affiant further denies and says that it is not true that all, either, or any of the said acts, doings, or claims of the said defendant, Rickey Land and Cattle Company, herein, are contrary to equity

or good conscience, or that they, or either of them, tend to the manifest or any, wrong, injury, or oppression of the complainants, or either of them, in the premises.

Wherefore, the affiant, on behalf of said Rickey Land and Cattle Company, prays that this Court deny the petition herein.

THOMAS B. RICKEY.

58 Subscribed and sworn to before me this 13th day of March, A. D. 1905.

[SEAL.] CHAS. H. PETERS,
Notary Public in and for Ormsby Co., Nevada.

In the Circuit Court of the United States, Ninth Circuit, for the District of Nevada.

MILLER & LUX, Complainant,
vs.
RICKEY LAND AND CATTLE COMPANY, Defendant.

Affidavit of Charles Rickey.

STATE OF CALIFORNIA,
County of Inyo, ss:

Charles Rickey, being duly sworn, deposes and says: That he is, and at all the times mentioned herein was, a citizen of the State of California, over the age of twenty-one years and a resident of Topaz, County of Mono, State of California.

That he is and since the organization of the corporation defendant, has been one of the stockholders of said defendant corporation, and has at all times since the organization of said corporation owned and held in his own name and right one hundred (100) shares of the capital stock of said corporation, which said
59 one hundred (100) shares have at all times been of the value of at least twenty thousand (20,000.00) dollars. That affiant became the owner of said shares by subscription to the capital stock of said corporation.

That Thomas B. Rickey, does not own, nor has he at any time owned, any interest in said one hundred (100) shares of the said capital stock of said corporation, and the said stock is now under the absolute and exclusive dominion and control of affiant, and affiant is liable and answerable for all burdens and liabilities which attach to the owner of such stock, and is entitled, in his own right, to receive and enjoy all the profits and earnings which accrue to said one hundred (100) shares of said capital stock, to the exclusion of said Thomas B. Rickey.

That the title of the defendant corporation to said water of the West Fork of the Walker River mentioned in the complaint herein, and the title of the defendant corporation to the water of the East Fork of the Walker River mentioned in the complaint herein, is such as was conveyed to it by said Thomas B. Rickey and in addi-

tion thereto, such title as has been acquired by said defendant corporation since its organization by the diversion and appropriation of said defendant corporation of the waters of said West Fork of the Walker River, and the said East Fork of the Walker
60 River which said diversion and appropriation of said waters, by said corporation to the extent alleged in said complaints in said Superior Court of Mono County, California, to wit, 1575 cubic feet per second from said West Fork of said Walker River and 504 cubic feet per second from said East Fork of said Walker River, has at all times been under claim of right against the whole world, and has at all times since the organization of said corporation been open, notorious, uninterrupted, exclusive, continuous and adverse to the said plaintiffs herein and to all the world.

CHARLES W. RICKEY.

Subscribed and sworn to before me, this 10th day of March, 1905.

[SEAL.] P. W. FORBES,
Notary Public in and for the County of Inyo, State of California.

In the Circuit Court of the United States, Ninth Circuit, for the District of Nevada.

MILLER & LUX, Complainant,
vs.
RICKEY LAND AND CATTLE COMPANY, Defendant.

61 *Affidavit of Alice B. Rickey.*

STATE OF NEVADA,
County of Ormsby, ss:

Alice B. Rickey, being duly sworn, deposes and says: That she is, and at all the times mentioned herein was, a citizen of the State of Nevada, over the age of twenty-one years, and a resident of Carson City, County of Ormsby, State of Nevada.

That she is and since the organization of the corporation defendant, has been one of the stockholders of said defendant corporation, and has at all times since the organization of said corporation, owned and held in her own name and right one hundred (100) shares of the capital stock of said corporation, which said one hundred (100) shares have at all times been of the value of at least twenty thousand ($20,000.00) dollars. That affiant became the owner of said shares by subscription to the capital stock of said corporation.

That Thomas B. Rickey does not own, nor has he at any time owned any interest in said one hundred (100) shares of the said capital stock of said corporation, and the said stock is now under the absolute and exclusive dominion and control of affiant, and affiant is liable and answerable for all burdens and liabilities which attach to the owner of such stock, and is entitled, in her own right,
62 to receive and enjoy all the profits and earnings which accrue to said one hundred (100) shares of said capital stock, to the exclusion of said Thomas B. Rickey.

That the title of the defendant corporation to said water of the West Fork of the Walker River mentioned in the complaint herein, and the title of the defendant corporation to the water of the East Fork of the Walker River mentioned in the complaint herein, is such as was conveyed to it by said Thomas B. Rickey and in addition thereto, such title as has been acquired by said defendant corporation since its organization by the diversion and appropriation of said defendant corporation of the waters of said West Fork of the Walker River, and the said East Fork of the Walker River which said diversion and appropriation of said waters, by said corporation to the extent alleged in said complaints in said Superior Court of Mono County, California, to wit: 1575 cubic feet per second from said West Fork of said Walker River and 504 cubic feet per second from said East Fork of said Walker River, has at all times been under claim of right against the whole world, and has at all times since the organization of said corporation been open, notorious, uninterrupted, exclusive continuous and adverse to the said plaintiffs herein and to all the world.

ALICE B. RICKEY.

63 Subscribed and sworn to before me this 13th day of Mar., 1905.

[SEAL.] CHAS. H. PETERS,
Notary Public in and for Ormsby County, Nevada.

[Endorsed:] No. 791. In the Circuit Court of the U. S., Ninth Circuit, District of Nevada. Miller & Lux, a corporation, Complainant, vs. Rickey Land & Cattle Company, a corporation, Defendant. Affidavit of Thomas B. Rickey, Charles Rickey and Alice B. Rickey, to the Order to Show Cause why Injunction should not issue restraining action in Mono County. Filed, March 13th, 1905. T. J. Edwards, Clerk.

In the Circuit Court of the United States for the District of Nevada.

No. 791.

MILLER & LUX (a Corporation), Complainant,
vs.
THE RICKEY LAND AND CATTLE COMPANY (a Corporation), Defendant.

64 THE PACIFIC LIVESTOCK COMPANY (a Corporation), Complainant,
vs.
THE RICKEY LAND AND CATTLE COMPANY (a Corporation), and MILLER & LUX (a Corporation), Defendants.

Order for Injunction Pendente Lite.

The order heretofore made herein on motion of the original complainant Miller & Lux, a corporation, requiring the defendant, the Rickey Land and Cattle Company, a corporation, to show cause

why an injunction should not issue pending this suit, according to the prayer of the bill of complaint of said Miller & Lux, having come on regularly to be heard upon the verified complaint herein, and upon affidavits filed by the defendant in opposition to said motion, and the Court having heard the arguments of counsel for said complainant and defendant, and the same having been duly considered by the Court:

And the Court having thereafter, upon motion of the Pacific Livestock Company, a corporation, notice of which motion was first duly given by said Pacific Livestock Company to the defendant and said Miller & Lux, granted leave to said Pacific Livestock Company to file a supplemental bill herein, making it a
65 party complainant in this suit, with the same rights and privileges as the original complainant, and with all benefit and advantage to said Pacific Livestock Company of all the pleadings and proceedings in this suit, the same as if it had been an original complainant herein, and said Pacific Livestock Company having thereupon filed its supplemental bill accordingly in this suit, and having thereby and by virtue of the order last above mentioned, become entitled to the benefit and advantage of the said motion of said Miller & Lux, for said injunction pendente lite:

And it appearing to the Court that said complainant Miller & Lux and Pacific Livestock Company are entitled to an injunction, pending this suit, according to the prayer of said original bill and said supplemental bill:

Now, therefore, it is hereby ordered, adjudged and decreed that said defendant, the Rickey Land and Cattle Company, its agents, servants and attorneys, and all persons acting in aid of them or any of them, be, and they are hereby enjoined and restrained from further prosecuting, as against said Miller & Lux or said Pacific Livestock Company, either of the two actions brought by said defendant, Rickey Land and Cattle Company, on the 15th day of October, 1904, in the Superior Court of the County of Mono, State of California, against said Miller & Lux, a corporation, and others,
66 as defendants, and respectively numbered 1055 and 1056 on the register of said Superior Court, and from taking any further step whatsoever in either of said actions as against said Miller & Lux or said Pacific Livestock Company, pending the final hearing and determination of this suit, and until the further order of this Court.

And it further appearing to the satisfaction of this Court that this injunction may be safely granted without requiring any bond from said Miller & Lux or said Pacific Livestock Company, it is further ordered that the writ of injunction may be issued herein as aforesaid without any bond being furnished by either said Miller & Lux, or said Pacific Livestock Company.

Dated June 25th, 1906.

THOMAS P. HAWLEY, *Judge.*

[Endorsed:] No. 791. In the Circuit Court of the United States for the District of Nevada. Miller & Lux, a corporation, Com-

plainant, v. The Rickey Land and Cattle Company, a corporation, Defendant. Order for Injunction Pendente Lite. Filed June 25th, 1906. T. J. Edwards, Clerk.

67 In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

No. 791.

MILLER & LUX (a Corporation), Complainant,
vs.
THE RICKEY LAND AND CATTLE COMPANY (a Corporation), Defendant.

THE PACIFIC LIVESTOCK COMPANY (a Corporation), Complainant,
vs.
THE RICKEY LAND AND CATTLE COMPANY (a Corporation) and MILLER & LUX (a Corporation), Defendants.

Petition for Appeal.

In the action originally commenced by Miller & Lux, a corporation, complainant, vs. The Rickey Land and Cattle Company, a corporation, defendant, in the Circuit Court of the United States, Ninth Circuit, District of Nevada, the Pacific Livestock Company, a corporation, was substituted as complainant in said action, and the title hereto is intended for the said action so commenced and now pending.

68 The above-named defendant, the Rickey Land and Cattle Company, a corporation, conceiving itself aggrieved by the interlocutory order and decree made on the 25th day of June, 1906, and entered on the 25th day of June, 1906, in the above-entitled cause, wherein it was ordered and decreed that the said defendant be enjoined and restrained from further prosecuting as against the Pacific Livestock Company, a corporation, and Miller & Lux, a corporation, either of the two certain actions brought by the defendant on the 15th day of October, 1904, in the Superior Court of Mono County, State of California, respectively numbered 1055 and 1056 on the register of actions of said Superior Court, and from taking any further steps whatever in either of said actions as against said Pacific Livestock Company, a corporation, and Miller & Lux, a corporation, pending the final hearing and determination of the said above-entitled suit and until the further order of said Circuit Court of the United States, Ninth Circuit.

And the said Rickey Land and Cattle Company, a corporation, prays that this, its appeal to the United States Circuit Court of Appeals for the Ninth Circuit, may be allowed and that a transcript of the records and proceedings and papers upon which said interlocutory decree, order and judgment was made, duly authenticated, may be sent to said United States Court of Appeals for the said Ninth Circuit.

69 And now, at the time of filing this petition for appeal, the said Rickey Land and Cattle Company, a corporation, appellant, files an assignment of errors, setting up separately and particularly each error asserted and intended to be argued in the United States Circuit Court of Appeals for the said Ninth Circuit.

And your petition- will ever pray.

RICKEY LAND AND CATTLE CO., INC.,
By T. B. RICKEY, *President,*
Defendant and Appellant.

JAMES F. PECK,
CHAS. C. BOYNTON,
Solicitors for Defendant.

[Endorsed:] No. 791. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. Miller & Lux, a Corporation, Complainant, vs. The Rickey Land and Cattle Company, a Corporation, Defendant. The Pacific Livestock Company, a Corporation, Complainant, vs. The Rickey Land and Cattle Company, a Corporation, and Miller & Lux, a Corporation, Defendants. Petition for Appeal. Filed July 23, 1906. T. J. Edwards, Clerk. James F. Peck, Charles C. Boynton, Solicitors for Defendant and Appellant. Offices, No. 911 Laguna St., San Francisco, Cal.

70 In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

No. 791.

MILLER & LUX (a Corporation), Complainant,
vs.
THE RICKEY LAND AND CATTLE COMPANY (a Corporation), Defendant.

THE PACIFIC LIVESTOCK COMPANY (a Corporation), Complainant,
vs.
THE RICKEY LAND AND CATTLE COMPANY (a Corporation) and MILLER & LUX (a Corporation), Defendants.

Assignment of Errors.

On the appeal from the order and decree made on the 25th day of June, 1906, and entered on the 25th day of June, 1906, in the above-entitled cause on the complaint of Miller & Lux, a corporation, complainant, wherein the Pacific Livestock Corporation, was afterwards substituted as complainant, which said order and decree enjoined and restrained the Rickey Land and Cattle Company, a corporation, from prosecuting two (2) certain actions in
71 the Superior Court of Mono County, State of California, against the said complainants, Miller and Lux, a corporation, and Pacific Livestock Company, a corporation, and said Rickey

Land and Cattle Company says, that in the record and proceedings in the above-entitled action there is manifest error in this, to wit:

First. That the prosecution of the actions in Mono County, State of California, enjoined by the order and decree appealed from would not in any manner, way or form impair, infringe upon or interfere with the jurisdiction of the said Circuit Court of the United States, Ninth Circuit, District of Nevada, in the case of Miller & Lux vs. T. B. Rickey and others pending in the said Circuit Court at the time of the commencement of said actions in Mono County, and the said Circuit Court erred therefore in making said order and decree appealed from.

Second. That the issues to be tried in the said suits in Mono County, State of California were not the same issues as were to be or could be tried in the said case Miller & Lux vs. T. B. Rickey and others pending in the Circuit Court of the United States, Ninth Circuit, District of Nevada.

Third. That the Rickey Land and Cattle Company was not a party to the said action of Miller & Lux vs. T. B. Rickey and others in the Circuit Court of the United States, Ninth Circuit,
72 District of Nevada and would not be bound in any manner by any judgment or decree rendered in that court, the Court therefore erred in making said order and decree restraining said Rickey Land and Cattle Company from prosecuting said actions in the Superior Court of Mono County, State of California.

Fourth. That any judgment rendered in the said action of Miller & Lux vs. T. B. Rickey and others pending in the Circuit Court of the United States, Ninth Circuit, District of Nevada, could not affect, quiet or determine the title of the Rickey Land and Cattle Company to the waters or the use of the waters of the Walker River in the State of California and it was therefore error to enjoin and restrain the Rickey Land and Cattle Company from prosecuting the said actions in Mono County, State of California, to quiet the title of the said Rickey Land and Cattle Company to the said waters of the Walker River in the State of California.

Fifth. That the Circuit Court of the United States, Ninth Circuit, District of Nevada, was without jurisdiction to determine or quiet the title of the Rickey Land and Cattle Company, a corporation, to the waters of the Walker River in the State of California and the said Circuit Court erred therefore in enjoining the Rickey Land and Cattle Company from quieting its title in the Superior Court of Mono County, State of California.

Sixth. That the issues in the said action of Miller & Lux
73 vs. T. B. Rickey and others in the Circuit Court of the United States, Ninth Circuit, District of Nevada, were not the same issues as were to be tried in the Superior Court of Mono County, State of California, in the said actions, the prosecution of which were enjoined by said order and decree.

Seventh. That the said Rickey Land and Cattle Company was not a party complainant or defendant in the said action of Miller & Lux vs. T. B. Rickey et al., pending in the Circuit Court of the United States, Ninth Circuit, District of Nevada, and therefore the

said Circuit Court erred in restraining said Rickey Land and Cattle Company, a corporation, from prosecuting said actions in the Superior Court of Mono County, State of California.

Eighth. That the said Circuit Court of the United States, Ninth Circuit, District of Nevada, has no jurisdiction to try and determine the rights to the use of the waters of the Walker River in the State of California by T. B. Rickey, nor the title of T. B. Rickey, to the waters of the Walker River in the State of California, nor the use of the Rickey Land and Cattle Company, a corporation, to the waters of the Walker River in the State of California, in said action of Miller & Lux vs. T. B. Rickey and others and therefore had no jurisdiction over the Rickey Land and Cattle Company, the successor in interest of T. B. Rickey, to the use of said water and the rights
74 to the use of said waters, because said water was in the State of California and the use of said water and the diversion of said water was made by said T. B. Rickey and by the said Rickey Land and Cattle Company, his successor, in the State of California, and the water and the land upon which the use of the said water was made was all in the State of California and not in the State of Nevada and the said Circuit Court of the United States, Ninth Circuit, District of Nevada, has no jurisdiction to try the rights of the Rickey Land and Cattle Company to the waters of the Walker River, or the title of the Rickey Land and Cattle Company to the use of the waters of the Walker River, as the successor of T. B. Rickey, and the Court erred therefore in rendering the order and decree restraining the appellant from prosecuting said actions in said Mono County.

Ninth. That the Circuit Court of the United States, Ninth Circuit, District of Nevada, had no jurisdiction to render said order and decree appealed from as against the appellant, Rickey Land and Cattle Company.

Tenth. That it was error for the said Circuit Court of the United States, Ninth Circuit, District of Nevada to make and render said order and decree appealed from.

Eleventh. That the said complaint upon which said interlocutory order and decree appealed from was granted does not state
75 facts sufficient to entitle the complainant to the said interlocutory decree.

Wherefore the appellant, Rickey Land and Cattle Company, prays that the decree of said Circuit Court of the United States, Ninth Circuit, District of Nevada, be reversed and the said Circuit Court of the United States, Ninth Circuit, District of Nevada, be ordered to enter an order and decree dissolving the injunction and restraint made by the said order and decree appealed from.

[SEAL.] RICKEY LAND AND CATTLE CO., INC.,
By T. B. RICKEY, *President,*
Defendant and Appellant.

JAMES F. PECK,
CHAS. C. BOYNTON,
Solicitors for Said Corporation, Appellant.

[Endorsed:] No. 791. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. Miller & Lux, a Corporation, Complainant, vs. The Rickey Land and Cattle Company, a Corporation, Defendant. The Pacific Livestock Company, a Corporation, Complainant, vs. The Rickey Land and Cattle Company, a Corporation, and Miller & Lux, a Corporation, Defendants. Assignment of Errors. Filed July 23, 1906. T. J. Edwards, Clerk. James
76 F. Peck, Charles C. Boynton, Solicitors for Defendant and Appellant. Offices, No. 911 Laguna St., San Francisco, Cal.

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

No. 791.

MILLER & LUX (a Corporation), Complainant,
vs.
THE RICKEY LAND AND CATTLE COMPANY (a Corporation), Defendant.

THE PACIFIC LIVESTOCK COMPANY (a Corporation), Complainant,
vs.
THE RICKEY LAND AND CATTLE COMPANY (a Corporation) and MILLER & LUX (a Corporation), Defendants.

Order for Appeal.

It is ordered that the appeal of the Rickey Land and Cattle Company, appellant in the above-entitled cause, to the United States Circuit Court of Appeals for the Ninth Circuit, District of Nevada, from the interlocutory order and decree made in the above-
77 entitled court on the 25th day of June, 1906, in the above-entitled cause, be, and the same hereby is allowed, and that a certified transcript of the record and proceedings herein be forthwith transmitted to said United States Circuit Court of Appeals.

And it is further ordered that the bond on appeal be fixed at the sum of five hundred dollars ($500) the same to act as a bond for costs and damages on appeal.

Dated San Francisco, Cal., July 23d, 1906.

WM. W. MORROW,
Circuit Judge.

[Endorsed:] No. 791. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. Miller & Lux, a Corporation, Complainant, vs. The Rickey Land and Cattle Company, a Corporation, Defendant. The Pacific Livestock Company, a Corporation, Complainant, vs. The Rickey Land and Cattle Company, a Corporation, and Miller & Lux, a Corporation, Defendants. Order for Appeal. Filed July 23, 1906. T. J. Edwards, Clerk. James F. Peck, Charles C. Boynton, Solicitors for Defendant and Appellant. Offices, No. 911 Laguna St., San Francisco, Cal.

Bond on Appeal.

Know all men by these presents, that we, Rickey Land and Cattle Company, a corporation, as principal, and S. Trask and H. C.
78 Cutting, as sureties, are held and firmly bound unto Miller & Lux, a corporation, and the Pacific Livestock Company, a corporation, in the full and just sum of five hundred dollars, to be paid to the said Miller & Lux, a corporation, and the Pacific Livestock Company, a corporation, certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 23d day of July, in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a Circuit Court of the United States, for the Ninth Circuit, District of Nevada, in a suit depending in said court between Miller and Lux a corporation, and the Pacific Livestock Company, a corporation, as complainants, and the Rickey Land and Cattle Company, a corporation, as defendant, an interlocutory order and decree was rendered against the said Rickey Land and Cattle Company, and the said Rickey Land and Cattle Company, a corporation, having obtained from said court an order allowing it to appeal to reverse the said order and decree in the aforesaid suit, and a citation directed to the said the Pacific Livestock Company, a corporation, and the said Miller & Lux, a corporation, citing and
79 admonishing them to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, that if the said Rickey Land and Cattle Company, a corporation, shall prosecute its said appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[CORPORATE SEAL.] RICKEY LAND AND CATTLE CO., INC.,
By T. B. RICKEY, *President*. [SEAL.]
S. TRASK. [SEAL.]
H. C. CUTTING. [SEAL.]

Acknowledged before me the day and year first above written.
[SEAL.] F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA,
District of Nevada, ss:

S. Trask and H. C. Cutting, being duly sworn, each for himself, deposes and says that he is a freeholder in said district, and is worth the sum of five hundred dolars, exclusive of property exempt
80 from execution, and over and above all debts and liabilities.

S. TRASK.
H. C. CUTTING.

Subscribed and sworn to before me this 23d day of July, A. D. 1906.

[SEAL.] F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals
for the Ninth Circuit.

[Endorsed:] No. 791. United States Circuit Court, District of Nevada, for the Ninth Circuit. Pacific Livestock Company, a Corporation, and Miller & Lux, a Corporation, Complainant, vs. Rickey Land and Cattle Company, a Corporation, Defendant. Bond on Appeal. Form of Bond and Sufficiency of Sureties approved. Wm. W. Morrow, Judge. Filed July 23d, 1906. T. J. Edwards, Clerk.

Clerk's Certificate to Transcript.

DISTRICT OF NEVADA, *ss:*

I, T. J. Edwards, clerk of the Circuit Court of the United States, Ninth Circuit, District of Nevada, do hereby certify that the foregoing fifty-eight typewritten pages, numbered from 1 to 58 inclusive, are a full, true and correct copy of the record and proceedings in
81 the cause therein entitled: and that the cost of the said record, amounting to the sum of thirty-nine dollars and eighty cents, have been paid by the appellant.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at Carson City, Nevada, this 25th day of August, 1906.

[SEAL.] T. J. EDWARDS, *Clerk.*

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Miller and Lux, a Corporation, and to its Solicitors, W. B. Treadwell and W. C. Van Fleet, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States Circuit Court for the District of Nevada wherein Rickey Land and Cattle Company, a corporation, is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be
82 corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable W. W. Morrow, United States Circuit Judge for the United States Circuit Court, Ninth Circuit, this 23rd day of July, A. D. 1906.

WM. W. MORROW,
United States Circuit Judge.

Received copy of the within citation this 27th day of July, 1906.

W. B. TREADWELL,
W. C. VAN FLEET,
Per ISAAC FROHMAN,
Solicitors for Appellee.

[Endorsed]: No. 791. U. S. Circuit Court, District of Nevada, for the Ninth Circuit. Miller and Lux, a Corporation, Pacific Land and Livestock Company, Complainant, vs. Rickey Land and Cattle Company, a Corporation, Defendant. Citation on Appeal. Filed July 30th, 1906. T. J. Edwards, Clerk U. S. Circuit Court, District of Nevada.

83 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to Pacific Land and Livestock Company, a Corporation, and W. C. Van Fleet and W. B. Treadwell, its Solicitors, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States Circuit Court for the Ninth Circuit, District of Nevada, wherein Rickey Land and Cattle Company, a corporation, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable W. W. Morrow, United States Circuit Judge for the Ninth Circuit, this 23d day of July, A. D. 1906.

WM. W. MORROW,
United States Circuit Judge.

84 Received copy of the within citation this 27th day of July, 1906.

W. B. TREADWELL,
W. C. VAN FLEET,
Per ISAAC FROHMAN,
Solicitors for Appellee.

[Endorsed]: No. 791. U. S. Circuit Court, District of Nevada, for the Ninth Circuit. Pacific Land and Livestock Company and Miller and Lux, a Corporation, Complainants, vs. Rickey Land and Cattle Company, Defendant. Citation on Appeal. Filed July 30th, 1906. T. J. Edwards, Clerk U. S. Circuit Court, District of Nevada.

[Endorsed]: No. 1366. United States Circuit Court of Appeals for the Ninth Circuit. Rickey Land and Cattle Company, a Corpo-

ration, Appellant, vs. Miller & Lux, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States Circuit Court for the District of Nevada.

Filed August 29, 1906.

F. D. MONCKTON, *Clerk.*

85 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1366.

RICKEY LAND AND CATTLE COMPANY (a Corporation), Appellant,

vs.

MILLER & LUX (a Corporation), Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Printed Transcript of Record.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing eighty-four (84) pages, numbered from one (1) to eighty-four (84) inclusive, to be a true copy of the printed Transcript of Record in the above-entitled case as the original and copies thereof were printed under my supervision pursuant to the provisions of rule 23 of the rules and practice of the said the United States Circuit Court of Appeals for the Ninth Circuit, and as the said original remains of record in my office.

Attest my hand and seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, this 22 day of May, A. D. 1907.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

86 No. 1366.

United States Circuit Court of Appeals for the Ninth Circuit.

RICKEY LAND AND CATTLE COMPANY (a Corporation), Appellant,
vs.
MILLER & LUX (a Corporation), Appellee.

Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.

ADDENDA.

Upon Appeal from the United States Circuit Court for the District of Nevada.

87 At a stated term, to wit, the October term A. D. 1906, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the courtroom, in the City and County of San Francisco, on Tuesday, the thirtieth day of October, in the year of our Lord one thousand nine hundred and six. Present: The Honorable William B. Gilbert, Circuit Judge; Honorable Erskine M. Ross, Circuit Judge.

No. 1366.

RICKEY LAND AND CATTLE COMPANY (a Corporation), Appellant,
vs.
MILLER & LUX (a Corporation), Appellee.

Order of Submission.

Ordered, appeal argued by Mr. James F. Peck, counsel for the appellant, and Mr. W. B. Treadwell, counsel for the appellee, and submitted to Gilbert and Ross, Circuit Judges, and Wolverton, District Judge, for consideration and decision.

88 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1366.

RICKEY LAND AND CATTLE COMPANY (a Corporation), Appellant,
vs.
MILLER & LUX (a Corporation), Appellee.

Upon Appeal from the United States Circuit Court for the District of Nevada.

Opinion of U. S. Circuit Court of Appeals.

Walker River is a stream flowing from within the State of California easterly into the State of Nevada. Towards its source it di-

vides into two branches, known as the East and West Forks. The junction is in the State of Nevada. The appellant and the appellee are each incorporated, the former having its residence in the State of California, and the latter in the State of Nevada. On the 10th of June, 1902, the appellee filed its bill of complaint in the Circuit Court of the United States for the District of Nevada, against Thomas B. Rickey and many other persons. Service of process was had upon Rickey, who thereafter, appeared and answered.

89 By said bill of complaint it was alleged, among other things, that complainant therein (the appellee here) was then, and for a long time prior thereto had been, the owner and seised in fee, and in actual possession, of certain lands situated in the County of Lyon, State and District of Nevada, particularly describing them; that Walker River is a natural stream and watercourse, which flows, and from time immemorial has flowed, to, over, upon, and through the said lands, which said lands include the banks, bed, and stream of said river; that at divers times, in said bill set forth, the complainant, its grantors and predecessors in interest, had first appropriated and diverted from said river portions of the waters thereof, amounting in all to a flow of 943.29 cubic feet of water per second, and had carried the same to and upon certain lands, and used the same for the irrigation thereof, and that said complainant was then the owner by such appropriation of certain interests in the waters of said river; such interests being particularly set forth and enumerated. It was then further alleged that Rickey, and other defendants in the suit, had diverted the waters of said Walker River at divers places above the lands of the complainant, and above the points at which complainant so diverted said water, and that a large portion of the water so diverted by the defendant in said suit was never returned to the stream, and that such defendants were con-

90 tinuing the diversion aforesaid, and had thereby deprived, and were depriving, such complainant of a large portion of said water to which it was so entitled; that each of said diversions so made by such defendants was without right, but that they had diverted said water, and were so diverting the same, under claim of right so to do, adversely to the complainant; that by such diversions complainant had been and was being deprived of sufficient water to irrigate its said lands, and was thereby rendered unable, and so long as said diversions were continued would be unable, to irrigate such lands, which it had theretofore been accustomed to irrigate, and was thereby rendered unable, and would be unable, properly or successfully to cultivate the same, or to raise crops thereon. And it was further alleged that if said defendants, or either of them, had any right to divert any water from the said river, such rights, and each of them, were subsequent and subordinate to the aforesaid appropriations so made by complainant, and its grantors and predecessors. The prayer was that the defendants in said suit, including Rickey, be enjoined and restrained from diverting any water from Walker River in subversion of the rights of complainant.

Subsequently, on the 15th day of October, 1904, the Rickey Land

& Cattle Company commenced an action in the Superior
91 Court of the County of Mono, State of California, against the appellee and a large number of other persons, by filing a complaint in said court, whereby it was alleged, among other things, that the said company was, and had been since the 6th day of August, 1902, the owner, in possession, and entitled to the possession of certain lands conveyed to it by Thomas B. Rickey, all situated in the State of California, and that the same constituted an entire contiguous body of land, over, through, and upon which flowed, and from time immemorial had flowed, a branch or tributary of Walker River called the West Fork, and that said lands and all thereof were, and from time immemorial had been, riparian to said stream, and situated along and bordering thereupon; that the said company was the owner, in possession, and entitled to the possession of such lands, and had the right to divert and appropriate all the waters of said West Fork of Walker River, and its tributaries in the State of California, to the extent of a constant flow of 1575 cubic feet of water per second. It was further alleged that the defendants in said action, and each of them, including the appellee herein, claimed some right, title and interest adverse to the said Rickey Land and Cattle Company, in and to said constant flow of 1575 cubic feet of water per second, or some part or portion thereof; that said right, title, and interest so claimed by such defend-
92 ants, and each of them, including the appellee, in and to said water, was without right, and that all claims of them, and each of them, to the waters of said West Fork of said Walker River were subordinate and subject to the ownership of said company, and its alleged right to divert and appropriate from said West Fork of Walker River a constant flow of the amount of water specified. The prayer was that the Rickey Land and Cattle Company be decreed to be the owner of the amount of water specified, and entitled to the use and enjoyment of the same, and that appellee and the other defendants therein, be subordinated to the interests of the said company in the flow of the water of said West Fork of Walker River.

On the same day—October 15, 1904—the Rickey Land and Cattle Company commenced another action of like character, in the same court, involving 504 cubic feet of water in the East Fork of Walker River, claimed under similar rights, and it was alleged that all of such rights were superior to the rights of defendants therein, including appellee whatever they might be.

The bill of complaint herein sets forth all these facts and proceedings, and further shows that, after appellee had filed its bill of complaint in the Circuit Court of the United States for the Dis-
93 trict of Nevada, and after Rickey had appeared and filed his answer therein, he (Rickey), on August 6, 1906, organized and incorporated the Rickey Land and Cattle Company, and conveyed to it all the lands and water rights thereafter claimed by it in the two actions commenced in the Superior Court of Mono County, in the State of California. Then follows the allegation: "That the issues tendered by said complaints in said two actions so brought by the defendant herein as plaintiff against your orator

and said other persons are, so far as concerns your orator, the same issues which were tendered by the said bill of complaint of your orator so filed in this court, so far as the same related to the defendant, Thomas B. Rickey, in said suit." The prayer is that the defendant be enjoined from prosecuting either of the actions commenced in Mono County, State of California, against the complainant, and for general relief.

The cause having been heard upon the bill and certain affidavits filed in defense, a temporary restraining order was directed to issue, and the appeal is from the action of the court in this regard.

The record contains a supplemental complaint by the Pacific Live Stock Company, showing that it has succeeded to the in-
94 terests of the appellee, but such complaint serves no essential purpose in the present controversy.

James F. Peck and Charles C. Boynton, for Appellant.

W. C. Van Fleet and W. B. Treadwell (Frohman & Jacobs and Frank H. Short, of Counsel), for Appellee.

Before Gilbert and Ross, Circuit Judges, and Wolverton, District Judge.

WOLVERTON, District Judge, delivered the opinion of the court:

Let us inquire, first, touching the nature of the suit instituted by the appellee as complainant against Rickey and others, in the Circuit Court of the United States for the District of Nevada, June 10, 1902, for the inquiry will settle the jurisdiction of the court to proceed in that cause, and in one aspect will determine its authority to grant the relief demanded in this cause. In the course of the inquiry, it is important that we first ascertain the nature of the subject-matter of the cause.

Says the Court in the case of Lower Kings River Water Ditch Co. vs. Kings River and Fresno Canal Co., 60 Cal. 408:

"'A watercourse consists of bed, banks and water.' (Angell on Watercourses, sec. 4.) The right of plaintiff, as stated in its
95 complaint, to have the water flow in the river to the head of its ditch, is an incorporeal hereditament, appertaining to its watercourse. Granting that plaintiff does not own the corpus of the water until it shall enter its ditch, yet the right to have it flow into the ditch appertains to the ditch. 'Real property consists of land, that which is affixed to land, and that which is incidental or appurtenant to land. (Civil Code, 658.) If the watercourse, consisting of the bed and banks of the trench, and of the water therein, be real property, the right to have water flow to it is incidental and appurtenant thereto."

So in Construction Co. vs. Ditch Co., 41 Or. 209, 215:

"If the riparian owner grants a right to divert the water and convey it away to and upon the lands of the grantee, the grant becomes an easement appurtenant to such lands, which becomes thereby the dominant estate, and the grant an incorporeal hereditament. If title be acquired by prescription, the estate and the right are the same."

So also in Wyatt vs. Larimer & Weld Irr. Co., 33 Pac. 144, Mr. Justice Goddard, speaking for the Court, says:

"That a valid appropriation of water from a natural stream constitutes an easement in the stream, and that such easement is an incorporeal hereditament, the appropriation being in per-
95 petuity, cannot well be disputed." And, after citing Washburn on Easements and Servitudes and Angell on Watercourses, proceeds: "The right acquired to water by an appropriator under our system is of the same character as that defined by the foregoing authorities as an incorporeal hereditament and easement. The consumer under a ditch possesses a like property. He is an appropriator from the natural stream, through the intermediate agency of the ditch, and has the right to have the quantity of water so appropriated flow in the natural stream, and through the ditch for his use."

And, generally, it is held that:

"The right of the prior appropriator to have the water flow in the stream to the head of his ditch is an incorporeal hereditament appurtenant to his ditch and coextensive with his right to the ditch itself."

Willey vs. Decker, 73 Pac. 210, 225.
Smith vs. Denniff, 60 Pac. 398.

Or, putting it in another form, that:

"A right to divert and use the waters of a stream, acquired
97 by appropriation, is a hereditament appurtenant to the land for the benefit of which the appropriation is made.

Conant vs. Deep Creek & Curlew Val. Irr. Co., 66 Fed. 188.

See, also:

Simmons vs. Winters, 21 Or. 35.
Hindman vs. Rizor, 21 Or. 112.
Bear Lake & River Waterworks & Irrigation Co. vs. Ogden City, 8 Utah, 494.
Tucker vs. Jones, 8 Mont. 225.
Sweetland vs. Olsen, 11 Mont. 27.
Cave vs. Crafts, 53 Cal. 135.

So it follows, as a deduction from these principles, as was said in the Conant case, that:

"An action, therefore, to quiet the title and determine and to establish the right to divert and use water for such purposes is in the nature of an action to quiet the title to real estate."

Under the bill there is the assertion of a valid appropriation of the waters of Walker River, for use upon lands in Nevada which are specifically described, and which the complainant owns, and the further averment that the defendants claim a right of diversion and appropriation adverse to that which complainant has acquired, and the prayer is, in effect, that defendants be restrained from the exercise of their alleged right to the injury of complainant.
98 Could there be a plainer case of an attempt to quiet title to the appropriation itself? Although the right to have the water of Walker River flow from above down to and within the

complainant's canals and ditches, for use upon its lands, is an incorporeal hereditament, it is, nevertheless, under the foregoing authorities, appurtenant to the realty in connection with which the use is applied. It savors of and is a part of the realty itself. The suit, therefore, in its purpose and effect, is one to quiet title to realty. Complainant's diversion being in Nevada, and the use being upon realty situated in Nevada, and the suit being one concerning or pertaining to that realty, it is necessarily local in character, and was properly instituted in the State of Nevada. See Conant vs. Deep Creek etc. Company, supra. The proposition seems so clear that it is scarcely necessary to cite other authorities in its support. And it is equally clear that the courts of one State are without jurisdiction to hear and determine suits instituted in another, for the adjustment of adverse claims respecting the legal title to realty, and which pertain to the realty as the subject-matter of the controversy.

There has been much discussion of the legal principle that, as to certain causes arising partly in one jurisdiction and partly in another, the right of action will be entertained in either juris-
99 diction. The principle is that, where two material facts are necessary to give a good cause of action, and they take place in different jurisdictions, the cause may be said to have arisen in either jurisdiction. Numerous authorities are cited in support of this principle, among which are the following:

"When an action is founded upon two things in different counties, both material to the maintenance of the action, it may be brought in the one county or the other." Com. Dig. "Action," N., 11.

"Where an injury has been committed in one county to real property situate in another, or wherever the action is founded upon two or more material facts, which took place in different counties, the venue may be laid in either." 1 Saund. Pl. & Ev. 413.

"Supposing the foundation of the action to have arisen in two counties, I think that, where there are two facts which are necessary to constitute the offense, the plaintiff may, ex necessitate, lay the venue in either." Ashurst, J., in Scott vs. Brest, 2 Term R. 238.

And "when matter in one county is depending upon the matter in the other county, there the plaintiff may choose in which county he will bring his action;" and: "If a man doth not repair a wall in Essex which he ought to repair, whereby my land in Middlesex is drowned, I may bring my action in Essex, for there is
100 the default; or I may bring it in Middlesex, for there I have the damage."

Bulwer's Case, 7 Coke, 1.

So, in Barden vs. Crocker, 10 Pick. 383, in an action brought in the county where the property was damaged for diversion of water in another, it was held that the action could be maintained in either county. So, also, in the case of Foot vs. Edwards (Fed. Cas. No. 4,908), an action for damages for an injury to the mill property of the plaintiff situated in Massachusetts, that the action

could be maintained in Connecticut, where the water was diverted to the injury of the mill. And, again, in the case of Rundle vs. Delaware & R. Canal (1 Wall. Jr. 275), an action was sustained in New Jersey "for damage done to plaintiff's realty in Pennsylvania." These authorities pertain to actions at law.

The general doctrine of the common law is that an action for injury to real property, as trespass, or case for nuisance, is local, and must be commenced within the county or district in which the land lies. Watts' Administratators vs. Kinney, 23 Wend. 484. This seems to be controlled, however, by the rule above referred to, that where an act has been committed in one jurisdiction which causes injury to realty in another, a suit may be brought in either. In further support of the latter proposition, Mr. Gould is authority. He says:

101 "If, however, a tortious act, committed in one county, occasions damage to land or any other local subject, situate in another, an action for the injury thus occasioned may be laid in either of the two counties, at the choice of the party injured. Thus, if, by the diversion or obstruction of a watercourse in the county of A., damage is done to lands, mills, or other real property in the county of B., the party injured may lay his action in either of those two counties." Gould, Pl., p. 105, Sec. 108.

In case of nuisance, however, where it is sought to abate the nuisance by injunctive process, it is requisite that the suit be instituted in the jurisdiction where the nuisance is maintained, because it is said the remedy is quasi in rem, and must act upon the thing itself which is causing the damage. This was held in the case of Stillman vs. White Rock Manufacturing Co., Fed. Cas. No. 13,446 (23 Fed. Cases, p. 83).

There is but little question that the same rule as to venue in the commencement of suits in equity will apply, as in actions at law. It is of primary importance, however, that a cause in equity exist, for, unless it does, the suit cannot be maintained anywhere. A suit may be local or transitory, as well as an action at law; and, if a suit pertains to or is concerning realty as the direct subject-matter of the inquiry, like an action at law in ejectment, it must be commenced in the jurisdiction where the realty is located. But

102 if jurisdiction rests upon an equitable cause, such as multiplicity of suits, irreparable injury, specific performance, recission, or the like, the suit need not necessarily be local. It may be transitory as actions are transitory, and if the appropriate conditions are present, the suit may be brought as actions may be brought, in either jurisdiction, and are therefore governed by the same principle. But, as we have heretofore determined, the present suit is one affecting realty, and was, therefore, local, and for this reason the venue was properly laid in the State of Nevada.

It is well determined that, "in a case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree."

Massie vs. Watts, 6 Cranch, 148.

Or, as expressed in general terms in the case of Phelps vs. McDonald, 99 U. S. 298, 308, that:

"Where the necessary parties are before a court of equity it is immaterial that the res of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the lex loci rei sitae, which he could do voluntarily, to give full effect to the decree against him.
103 Without regard to the situation of the subject-matter, such courts consider the equities between the parties, and decree in personam according to those equities, and enforce obedience to their decrees by process in personam."

This rule "has been often applied," says the Court, in Cole vs. Cunningham, 133 U. S. 107, 119, "by the courts of the domicile against the attempts of some of its citizens to defeat the operation of its laws to the wrong and injury of others."

If such be the law where the res is without the jurisdiction of the court, by how much stronger will be its application where the jurisdiction extends over the res as well as to the person. So that the Court, having jurisdiction of the res, that is, of the thing in controversy, which is the realty in the present instance, has undoubted authority and jurisdiction, having also jurisdiction of the person, to protect the thing against the encroachments of the person, whether those encroachments come from within the State or without.

The appellant's counsel maintain that, because the appellant has set up in its answer and cross-bill to the original suit that it has an appropriation in California for the purpose of irrigating lands in that State, therefore the Court in Nevada has no jurisdiction to determine its rights in the State of California. The contention seems to us to be beside the question. The defendant will
104 not be permitted, by thus setting up a cause of suit in the State of California, to defeat the jurisdiction of the court in the State of Nevada. The complainant must be permitted to proceed upon the case made by its pleadings, and the defendant cannot defeat the jurisdiction by alleging that it has rights elsewhere, which may conflict with the rights of the complainant. It may be said that the Court in Nevada has not the power to quiet the title of the defendant in the State of California. But the defendant has the right to set up its conflicting interests, which arose in California, as a defense against the attempt of the complainant to have its title in Nevada quieted, because the complainant's title must depend upon whether it has the better right as against the defendant—the rights of the parties arising in the States in which their respective interests are found. So that the answer and cross-complaint of the defendant can only operate defensively in the original suit, and not to give the defendant a right to have its title also quieted in the State of California. Though the Nevada court is not authorized or empowered to settle the rights of the parties in the State of California, it may look, nevertheless, under the defensive answer to the appropriation in the State of California, to ascertain and de-

termine whether such appropriation is prior and paramount to the complainant's appropriation, and, if not, then, to settle and quiet complainant's title and rights thereto.

105 That our position may be fully understood, we will extend the discussion a little. The water in the stream, which has a propensity to seek its level, and will continue in its current to the sea, is in strict reality the veritable thing in controversy. It knows not imaginary state or county lines, and is a thing in which no man has a property until captured to be applied to a beneficial use. The right of appropriation is recognized in law, which means the right of diversion and use. It is the right, not to any specific water, but to some definite quantity of that which may at the time be running in the stream. So the right acquired by an appropriation includes the right to have the water flow in the stream to the point of diversion. The fact of a state line intersecting the stream does not, within itself, impinge upon the right. In other words, the appropriation may still be acquired, although the stream is interstate and not local to one State; nor will the mere fact that the stream has its source in one State authorize a diversion of all the water thereof as against an earlier and prior appropriator across the line in another State. On the contrary, one who has acquired a right to the water of a stream by prior appropriation, in accordance with the laws of the State where made, is protected in such right as against subsequent appropriators, though the latter withdrew the water within the limits of a different State. How-

106 ell vs. Johnson, 89 Fed. 556; Hoge vs. Eaton, 135 Fed. 411; Anderson vs. Bassman, 140 Fed. 14. So that in determining the right of appropriation in one State, it may become necessary to ascertain what are the rights in another, and a mere assertion of rights in the courts of the latter State cannot operate to preclude the courts of the former from exercising cognizance over the entire subject matter before them. The very question that appellant makes was determined in the case of Anderson vs. Bassman, **supra**:

"It is objected by the defendants," says Morrow, Circuit Judge, "that the relief sought by the bill, in determining the rights of the complainants to a specific quantity of the waters of the West Fork of the Carson River, is beyond the jurisdiction of this court, in that it is asking the Court to pass upon titles to real property in another State."

And the decision was against the contention. So the decision here must be against appellant's contention upon the point urged.

That the present bill is ancillary to the original suit instituted in the Circuit Court for the District of Nevada is not questioned. It is not infrequent that the State courts come in conflict with the Federal courts, and vice versa of the Federal with the State, and this where they exercise concurrent jurisdiction. In all such cases it has been firmly established that the court first acquiring

107 jurisdiction of the subject matter of the action or suit, and of the parties, is entitled to maintain it until the controversy is at an end, and the rights of the parties are fully admin-

istered, without interference from, and to the exclusion of the other. Pitt vs. Rodgers, 104, Fed. 387; Starr vs. Chicago, R. I. & P. Ry. Co., 110 Fed. 3. In the maintenance of such jurisdiction, it is a common remedy to invoke the injunctive process, not against the court offending, but against the parties, to restrain them from proceeding therein in antagonism to the jurisdiction first acquired; and the remedy is available either before or after judgment or decree, either to enable the Court to render an effective adjudication, or to command full obedience to its mandates. In support of the doctrine generally, we quote from three of the authorities out of many that may be cited. In Peck vs. Jenness, 7 Howard, 612, 624, the Court says:

"It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have
108 their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice."

So in Root vs. Woolworth, 150 U. S. 401, 410:

"It is well settled that a court of equity has jurisdiction to carry into effect its own orders, decrees and judgments, which remain unreversed, when the subject matter and the parties are the same in both proceedings. The general rule upon the subject is thus stated in Story's Equity Pleading (9th ed.), sec. 338: 'A supplemental bill may also be filed, as well after as before a decree; and the bill, if after a decree, may be either in aid of the decree, that it may be carried fully into execution; or that proper directions may be given upon some matter omitted in the original bill, or not put in issue by it, or by the defense made to it; or to bring forward parties before the court, or it may be used to impeach the decree, which is the peculiar case of a supplemental bill, in the nature of a bill of review, of which we shall treat hereafter. But where a supplemental bill is brought in aid of a decree, it is merely to carry out
109 and to give fuller effect to that decree, and not to obtain relief of a different kind on a different principle; the latter being the province of a supplementary bill in the nature of a bill of review, which cannot be filed without the leave of the Court.'"

And again, in French, Trustee, vs. Hay, 22 Wall. 250, Mr. Justice Swayne speaking for the Court:

"It (the bill then pending) is auxiliary and dependent in its character, as much so as if it were a bill of review. The Court having jurisdiction in personam had power to require the defend-

ant to do or to refrain from doing anything beyond the limits of its territorial jurisdiction which it might have required to be done or omitted the limits of such territory. Having the possession and jurisdiction of the case, that jurisdiction embraced everything in the case, and every question arising which could be determined in it until it reached its termination, and the jurisdiction was exhausted. While the jurisdiction lasted it was exclusive, and could not be trenched upon by any other tribunal."

The case relied upon by counsel for appellant—Oliver vs. Parlin & Orendorff, 105 Fed. 272—is in harmony with these authorities; but there the Federal court had not acquired previous jurisdiction over the person of the Groesbeck National Bank, which it was sought to enjoin.

110 The doctrine being thus established, and the jurisdiction of the Federal court in the present case having first attached, section 720 R. S. is without application. As it well known, this section inhibits the granting of a writ of injunction by a Federal court to stay the proceedings of a State court.

"It is well settled," says Mr. Bates, in his work on Fed. Equity Pro., sec. 541, "upon both reason and authority, that the prohibition contained in this statute 'does not apply where the Federal court has first obtained jurisdiction, or where the State court, having first obtained jurisdiction, the case has been removed to the Federal court. In such cases the Federal court may restrain all proceedings in a State court which would have the effect of defeating or impairing its jurisdiction. It extends only to cases in which the jurisdiction has first attached.' If the rule were otherwise, 'after suit brought in a Federal court, a party defendant could, by resorting to a suit in a State court, defeat, in many ways, the effective jurisdiction and action of the Federal court, after it had obtained full jurisdiction of person and subject matter.'"

The appellant, the Rickey Land and Cattle Company, has succeeded to all the interest of Rickey, in so far as such interest affects and pertains to the subject matter of the controversy in the case of Miller & Lux vs. Rickey et al., pending in the U. S. Cir-

111 cuit Court in Nevada. The position is so apparent from Rickey's own affidavit as to put at rest all contention about it. He says: "That the said Rickey Land and Cattle Company acquired by conveyance from said Thomas B. Rickey all his right, title and interest to certain water rights, and rights to the use of water; and said water rights, and rights to the use of water are in part the water rights, and rights to the use of water described and mentioned in the said complaints in said actions commenced in Mono County; but the said water rights so acquired by the said Rickey Land and Cattle Company from the said Thomas B. Rickey are not the same rights to water and rights to the use of water alleged in said complaints in said Mono County in this, that since the conveyance of said lands by Thomas B. Rickey, and said water rights, and the right to the use of water to said Rickey Land and Cattle Company, which conveyance was made, executed and delivered on the 6th day of August, 1902, the Rickey Land and Cattle

Company has at all times appropriated and diverted the water described in the said complaints in said actions commenced in said Mono County for a beneficial purpose, and has used the same for a beneficial purpose, and has diverted, appropriated and used such water adversely to all the world, and under a claim of right so to do, and has so diverted, appropriated and used such water con-
112 tinuously, uninterruptedly, notoriously, adversely, exclusively and peaceably."

The affiant attempts to show wherein the rights that the Rickey Land and Cattle Company now claim are different from those which were conveyed and transferred to it by Rickey himself, and in that attempt it is significant that he shows that whatever difference exists at the present time between the two rights is the result of what the company has done since its acquirement from Rickey, that is, in the way of continuing and increasing Rickey's alleged original appropriations of water, but not to the extent of acquiring any new or different rights, by adverse holding and possession, or otherwise. In other words, the company has merely builded upon the rights obtained from Rickey, without acquiring any new or additional rights. These are the rights that the Rickey Land and Cattle Company is seeking to establish in the Superior Court of Mono County, California, against which it is maintained that the rights of the appellee are adverse and subordinate, and the same rights which the appellee asserts are subordinate to those that it has acquired and is possessed of and owns; so that the issues must needs be the same, and the controversy the same, whether Miller & Lux, the appellee goes into the Mono County Superior Court, or the Rickey Land and Cattle Company makes the defense in the United States
113 Circuit Court for the District of Nevada. The Nevada court, therefore, having first acquired jurisdiction, may maintain and exercise it to the end, to the exclusion of the State court in Mono County.

The next and final question relates to the doctrine of lis pendens, and its application here. As to this, there need be but little said. In the case of Mellen vs. Moline Iron Works, 131 U. S. 352, 371, the Court says:

"Purchasers of property involved in a pending suit may be admitted as parties, in the discretion of the court; but they cannot demand, as of absolute right, to be made parties, nor can they complain if they are compelled to abide by whatever decree the Court may render, within the limits of its power, in respect to the interest their vendor had in the property purchased by them pendente lite. Eyster vs. Gaff, 91 U. S. 521, 524; Union Trust Co. vs. Inland Navigation and Improvement Co., 130 U. S. 565; 1 Story's Eq. Jur., sec. 406; Murray vs. Ballou, 1 Johns. Ch. 566. As said by Sir William Grant, in Bishop of Winchester vs. Paine, 11 Ves. 194, 197, 'the litigating parties are exempted from the necessity of taking any notice of a title so acquired. As to them, it is as if no such title existed. Otherwise, such suits would be indeterminable; or, which would be the same in effect, it would be in the

pleasure of one party at what period the suit should be de-
114 termined.' The present proceeding is an attempt, upon the part of a purchaser pendente lite, to relitigate, in an original, independent suit, the matters determined in the suit to which his vendor was a party. That cannot be permitted, consistently with the settled rules of equity practice."

The text of 2 Black on Judgments, sec. 550, seems authoritative. It is as follows:

"It is a general rule that a purchaser of property, * * * who buys pending a litigation concerning it, comes into privity with his vendor, so as to be bound by the judgment in that suit, the same as if made a party of record. * * * 'We apprehend it is well settled that he who purchases property pending a suit in which the title to it is involved takes it subject to the judgment or decree that may be passed in such suit against the person from whom he purchases. That he purchased bona fide, and paid a full consideration for it, will not avail against such judgment or decree. Nor will he be permitted to prove that he had no notice of the suit. The law infers that all persons have notice of the proceedings of courts of record. The law is that he who intermeddles with property in litigation does it at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset.' * * * In a late case it is said that the purpose of the rule is to keep the subject matter of the
115 litigation within the power of the Court until judgment or decree shall be entered, since, otherwise, by successive alienations pending the suit, the judgment or decree could be rendered abortive and impossible of execution. It is also said that two things seems to be indispensable to give effect to the doctrine of lis pendens: (1) That the litigation must be about some specific thing which must necessarily be affected by the termination of the suit; and (2) that the particular property involved in the suit must be so definite in the description that anyone reading it can learn thereby what property is intended to be made the subject of litigation."

The conditions present meet every requisite of these authorities. As is apparent from the record, the Rickey Land and Cattle Company came into the property and rights of Thomas B. Rickey after the suit to quiet title was begun in the Circuit Court for the District of Nevada, and after Rickey had answered therein, and the Court had acquired full and complete jurisdiction, both over the subject matter of the suit and over the person of Rickey. So that the Rickey Land and Cattle Company stands in privity of title with Rickey, and can claim nothing beyond what Rickey could have claimed in the original suit. The company is bound as Rickey would have been bound, and must abide the termination of such suit for the adjustment of the adverse rights claimed to the
116 appropriation of water from Walker River.

These considerations lead to the affirmance of the decree of the Circuit Court, and it is so ordered.

[Endorsed:] No. 1366. U. S. Circuit Court of Appeals for the Ninth Circuit. Rickey Land and Cattle Co. vs. Miller & Lux (a Corporation). Opinion. Filed March 4, 1907. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1366.

RICKEY LAND AND CATTLE COMPANY (a Corporation), Appellant,
vs.
MILLER & LUX (a Corporation), Appellee.

Decree of U. S. Circuit Court of Appeals.

Appeal from the Circuit Court of the United States for the District of Nevada.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Nevada, and was duly submitted.

117 On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the order or decree of the said Circuit Court appealed from in this cause be, and the same is hereby, affirmed, with costs.

[Endorsed]: Decree. Filed and entered March 4, 1907. F. D. Monckton, Clerk.

At a stated term, to wit, the October term, A. D. 1900, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the courtroom, in the City and County of San Francisco, on Monday, the twentieth day of May, in the year of our Lord one thousand nine hundred and seven. Present: The Honorable William B. Gilbert, Circuit Judge; Honorable John J. De Haven, District Judge; Honorable William H. Hunt, District Judge.

No. 1366.

RICKEY LAND AND CATTLE COMPANY, (a Corporation), Appellant,
vs.
MILLER & LUX (a Corporation), Appellee.

118 *Order Denying Petition for Rehearing, etc.*

Ordered, petition for a rehearing, heretofore filed herein, denied.

Upon motion of Mr. Charles C. Boynton, counsel for the appellant, ordered, issuance of mandate of this Court in the above-entitled cause stayed for the period of ten (10) days from date.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1366.

RICKEY LAND AND CATTLE COMPANY (a Corporation), Appellant,
vs.
MILLER & LUX (a Corporation), Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Proceedings, etc.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing thirty-three (33) pages, numbered from one (1) to thirty-three (33), inclusive, to be a true copy of all proceedings had in the above-entitled case in the said the United States Circuit Court of
119 Appeals for the Ninth Circuit, as the same remain of record in my office, and that the same in connection with the preceding certified copy of the printed Transcript of Record in the above-entitled case constitute a true copy of the entire record therein.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, this 22 day of May, A. D. 1907.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk*.

120 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America, to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Rickey Land and Cattle Company is appellant, and Miller & Lux (a corporation) is appellee, which suit was removed into said Circuit Court of Appeals by virtue of an appeal from the Circuit Court of the United States for the District of Nevada, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United
121 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 11th day of March, in the year of our Lord one thousand nine hundred and eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

122 [Endorsed:] File No. 21,049. Supreme Court of the United States. No. 646, October Term, 1907. Rickey Land & Cattle Co., vs. Miller & Lux. Docketed. No. 1366. United States Circuit Court of Appeals for the Ninth Circuit. Writ of Certiorari. Filed Mar. 25, 1908. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

123 United States Circuit Court of Appeals for the Ninth Circuit.

RICKEY LAND AND CATTLE COMPANY, Appellant,

vs.

MILLER & LUX (a Corporation), Appellee.

On Appeal from the Circuit Court of the United States for the District of Nevada.

Stipulation.

Whereas the Supreme Court of the United States has heretofore duly issued its writ of certiorari directed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit directing said Judges to send without delay to the said Supreme Court of the United States the record and proceedings in the above entitled cause;

Now, therefore, it is hereby stipulated by and between the attorneys of record for the respective parties above-named that the certified transcript of record heretofore filed in the Supreme Court of the United States in connection with and in support of the petition for said writ of certiorari, the same being docketed as No. 646 of October Term, 1907, shall be taken and considered as the transcript of the record and proceedings remaining in the Circuit Court of Appeals for the Ninth Circuit as though the same had been returned in obedience to said writ of certiorari.

JAMES F. PECK.
CHAS. C. BOYNTON,
Attorneys for Appellant.
W. B. TREADWELL,
Attorney for Appellee.

FRANK L. SHORT.
FROHMAN & JACOBS,
Of Counsel for Appellee.

124 (Endorsed:) Docketed No. 1366. United States Circuit Court of Appeals, Ninth Circuit. Rickey Land & Cattle Co., Appellants, vs. Miller & Lux, (a Corporation), Appellee. Stipulation as to Return of Writ of Certiorari. Filed Mar. 25, 1908. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. Chas. C. Boynton, Attorney at Law, 1064 Mills Building, San Francisco, Cal.

125 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1366.

RICKEY LAND AND CATTLE COMPANY, a Corporation, Appellant,
vs.
MILLER & LUX, a Corporation, Appellee.

Certificate of Clerk United States Circuit Court of Appeals to Stipulation of Counsel Relative to Return to Writ of Certiorari.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the next two preceding pages, numbered one (1) and two (2), to be a true copy of a "Stipulation as to Return to Writ of Certiorari" filed in the above-entitled cause on the twenty-fifth day of March, A. D. 1908, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this second day of April, A. D. 1908.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk*.

126 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1366.

RICKEY LAND AND CATTLE COMPANY, a Corporation, Appellant,
vs.
MILLER & LUX, a Corporation, Appellee.

Return to Writ of Certiorari.

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as Clerk of the said Court, in obedience to the annexed writ of certiorari issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to send without delay to the said Supreme Court the record and proceedings in the above-entitled cause, do attach to the said writ a certified copy of a stipulation entered into by and between the counsel for the respective parties to the said cause, the original of which stipulation is on file and of record in my office, and do hereby certify the said stipulation as due return to the said writ.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said the United States Circuit Court of Appeals for

the Ninth Circuit, at the city of San Francisco, in the State of California, this 2nd day of April, A. D. 1908.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk*.

[Endorsed:] 646. 21049.

127 [Endorsed:] File No. 21,049. Supreme Court U. S. October Term, 1909. Term No. 89. Rickey Land & Cattle Co., Petitioner, vs. Miller & Lux. Writ of Certiorari & return. Filed May 18th, 1908.

No. 648. 859

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907

RICKEY LAND AND CATTLE COMPANY (a Corporation),
Petitioner,

vs.

MILLER & LUX (a Corporation),
Respondent.

MOTION FOR WRIT OF CERTIORARI AND NOTICE OF MOTION.

F. D. McKENNEY,
JAMES F. PECK,
CHAS. C. BOYNTON,
Solicitors for Petitioner.

PRESS OF THE JAMES H. BARRY CO.
512-514 LEAVENWORTH ST.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907

RICKEY LAND & CATTLE CO. (A CORPORATION),
Petitioner,

vs.

MILLER & LUX (A CORPORATION),
Respondent.

MOTION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE UNITED STATES TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Comes now the Rickey Land & Cattle Co., a corporation, by its counsel appearing in that behalf, and moves this Honorable Court that it shall, by certiorari, or other proper process, directed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, require said Court to certify to this Court, for its review and determination, a certain cause in said Court of Appeals

lately pending, wherein the respondent, Miller & Lux, was appellee, and your petitioner, Rickey Land & Cattle Co., was appellant, and to that end it now tenders herewith its petition and brief, with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

F. D. McKENNEY,

Counsel for said Petitioner for the Purpose of this motion.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM.

RICKEY LAND & CATTLE CO. (A CORPORATION),
Appellant,

vs.

MILLER & LUX (A CORPORATION),
Respondent.

NOTICE OF APPLICATION TO THE SUPREME COURT OF THE UNITED STATES FOR WRIT OF CERTIORARI.

To Miller & Lux, a corporation, Appellee, and to W. B. Treadwell, Frank H. Short, and Frohman & Jacobs, its counsel:

Please take notice that on Monday, the 2nd day of March, 1908, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, that the Rickey Land & Cattle Company, a corporation, appellant, will, upon its verified petition and a copy of the entire record in this cause, submit a motion, a copy of which and of the petition

for writ of certiorari and brief in support thereof, are herewith delivered to you, to the Supreme Court of the United States, in its court room, at the Capitol in the City of Washington, D. C.

F. D. McKENNEY,
JAMES F. PECK,
CHARLES C. BOYNTON,
Solicitors for Appellant.

The foregoing notice is hereby accepted and delivery of a copy thereof and of the petition for a writ of certiorari and brief in support of petition are hereby acknowledged, and it is hereby stipulated and agreed that the said motion may be submitted to the Court on Monday, the 2nd day of March, 1908.

W. B. TREADWELL,
FRANK H. SHORT,
FROHMAN & JACOBS,
Solicitors for Miller & Lux, Appellee.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

RICKEY LAND AND CATTLE COMPANY (*a Corporation*),

Petitioner,

vs.

MILLER & LUX (*a Corporation*),

Respondent.

Petition for Writ of Certiorari.

F. D. McKENNEY
JAMES F. PECK,
CHAS. C. BOYNTON,
Solicitors for Petitioner.

PRESS OF THE JAMES H. BARRY CO.
212-214 LEAVENWORTH ST.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

RICKEY LAND AND CATTLE COMPANY (a Corporation),
Petitioner,

vs.

MILLER & LUX (a Corporation),
Respondent.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of the Rickey Land and Cattle Company, a corporation, respectfully shows to this Honorable Court as follows:

I.

That at all times since the 6th day of August, 1902, your petitioner has been, and now is, a corporation created and existing under the laws of the State of Nevada, and having its principal place of business at Carson City, in the State of Nevada; that at all times

since June 10th, 1902, and for a long time prior thereto, and now, Miller & Lux was and is a corporation created and existing under and by virtue of the laws of the State of California.

II.

That on the 10th day of June, 1902, a bill of complaint was filed in the Circuit Court of the United States for the District of Nevada by said Miller & Lux, respondent, against one Thomas B. Rickey and one hundred and thirty-seven other defendants, to procure a decree of said Circuit Court of the United States for the District of Nevada, enjoining and restraining said Thomas B. Rickey and said one hundred and thirty-seven other defendants from diverting the water flowing in the channel of the Walker River.

In said bill of complaint it was alleged by the complainant, that each of the defendants was diverting water from the channel of the Walker River *"under "a claim of right so to do made by each of said de- "fendants."*

The complainant in said suit alleged that said complainant had owned and possessed, and was entitled to a superior and prior right as against each defendant to the flow of nine hundred and forty-three and twenty-nine one-hundredths (943.29) cubic feet per second of the water flowing in the channel of the Walker River, for use upon certain lands in the State of Ne-

vada, in the complaint described, and alleged in said complaint, that said water had been so used on said land from the time prior to the use of any water from said river by either of said defendants, and the subpœna *ad respondendum* was issued and served upon all of the defendants.

III.

Defendant Thomas B. Rickey, in the action commenced in the Circuit Court of the United States on the 10th day of June, 1902, as aforesaid, filed on the 4th day of August, 1902, the plea of said Thomas B. Rickey to the jurisdiction of the United States Circuit Court for the District of Nevada, and in support of said plea alleged that the said Walker River was a natural water course, arising in and flowing through the eastern part of the State of California, into and through the western part of the State of Nevada; and further alleged in said plea to the jurisdiction that all diversions of water from said Walker River made by said Thomas B. Rickey were at all times made in the State of California, and that the water so diverted was used for the irrigation of lands owned by said defendant Thomas B. Rickey, situate in the State of California, and that said lands, upon which said water was so used, were wholly outside of the State of Nevada, and said Thomas B. Rickey, in said plea, disclaimed any right to divert any of the waters of Walker River after the said waters had flowed in

said River into the State of Nevada, and in said plea it was asserted that because of said facts the said United States Circuit Court for the District of Nevada had no jurisdiction to try and determine the rights of said Thomas B. Rickey to the waters of said Walker River in the State of California, or to enjoin the alleged diversion of water by said Thomas B. Rickey, or to enjoin or restrain said Thomas B. Rickey from committing the alleged trespasses outside of the territorial limits of the State of Nevada. Said plea came on for argument before said United States Circuit Court for the District of Nevada, and after argument was overruled.

See the opinion of said Court in *Miller & Lux* vs. *Rickey et al.*, 127 Federal Reporter, 573.

IV.

That said defendant Thomas B. Rickey, together with other persons, did, on the 6th day of August, 1902, organize the corporation Rickey Land and Cattle Company, petitioner herein; that after the organization of said corporation, Rickey Land and Cattle Company, on the said 6th day of August, 1902, said Thomas B. Rickey did transfer and convey by deeds of conveyance properly executed, and acknowledged to the corporation Rickey Land and Cattle Company, all his lands, water and water rights, and rights to the use of water in said Walker River in the State of California.

That said Walker River in the State of California flowed through said lands so conveyed by said Thomas B. Rickey to the Rickey Land and Cattle Company in its natural channel, and the said lands so conveyed formed the bed and banks of the said Walker River.

That from time immemorial the said Walker River has been, and now is, a natural stream with well defined bed and banks, and the said lands so conveyed by said Thomas B. Rickey to said Rickey Land and Cattle Company were riparian to said Walker River.

V.

That said Walker River is, and from time immemorial has been, a natural stream, or water course, having its source in two branches, known as the East Fork of the Walker River and the West Fork of the Walker River. That both of said branches have their sources in the State of California, and from thence flow through the eastern part of the State of California, into and through the western part of the State of Nevada, and said two branches of said Walker River unite in said State of Nevada above the place where it is alleged, in said complaint filed by Miller & Lux on the 10th day of June, 1902, that Miller & Lux diverts water from said Walker River.

VI.

That on the 15th day of October, 1905, the said Rickey Land and Cattle Company, petitioner herein, commenced an action in the Superior Court of Mono County, State of California, against one hundred and sixty-six (166) defendants, including Miller & Lux, the complainant in said action commenced in the United States Circuit Court for the District of Nevada, on the 10th day of June, 1902.

That said action was commenced by the filing of a complaint by said Rickey Land and Cattle Company in said Superior Court of Mono County, in which said complaint said Rickey Land and Cattle Company alleged that the said Rickey Land and Cattle Company had been since the 6th day of August, 1902, the owner, and in possession, and entitled to the possession of certain lands in the State of California, which said lands were the lands so conveyed by said Thomas B. Rickey to said Rickey Land and Cattle Company; and in said complaint it was further alleged that the said lands constituted one entire, continuous body of land over and through, and upon which said West Fork of the Walker River flows, and from time immemorial has flowed; and that said lands, and all thereof, are, and from time immemorial have been, riparian to said West Fork of the Walker River, situate along and bordering upon said West Fork of the Walker River.

And it was further alleged in said complaint filed in Mono County, State of California, that said Rickey Land and Cattle Company, petitioner herein, is the owner of, in possession of and entitled to the possession, use and enjoyment of, and has the right to divert and appropriate all the waters of said West Fork of the Walker River and its tributaries in the State of California, to the extent of a constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second, for use upon said lands in the State of California, riparian to said West Fork of the Walker River; and it was further alleged that each of said one hundred and sixty-six (166) defendants in said action, including said defendant Miller & Lux therein, claims some right, title and interest adverse to the Rickey Land and Cattle Company, complainant in said action in Mono County, in and to said constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second, or some part or portion thereof, in the West Fork of the Walker River in the State of California; and it was further alleged in said complaint in Mono County that said right, title and interest in and to said water so claimed or asserted by each of said defendants, including said Miller & Lux herein, is without right, and that all claims of each of said defendants, including said Miller & Lux, to the waters of said West Fork of the Walker River are subordinate and subject to the said alleged ownership of said Rickey Land and

Cattle Company and its right to divert and appropriate from said West Fork of said Walker River in the State of California a constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second, for use upon its said lands riparian to said West Fork of said Walker River in the State of California, and said Rickey Land and Cattle Company, petitioner herein, plaintiff in said action commenced in Mono County, prayed that said Superior Court in Mono County, State of California, should adjudge that the said Rickey Land and Cattle Company, petitioner herein, complainant in said action, is the owner of, and in the possession of, and in the use and enjoyment of, and entitled to the possession, use and enjoyment of, and has the right to appropriate and divert all the waters of said West Fork of said Walker River in the State of California, to the extent of a constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second for use on its land riparian to said West Fork of the Walker River in the State of California; and it was further prayed in the said complaint in said Superior Court of Mono County that said court further adjudge that neither of the defendants in said action in Mono County, including said Miller & Lux, has any right, title, interest, claim or estate in or to any of the waters, or to the use thereof, flowing, or which may hereafter flow, in said West Fork of the Walker River in the State of California, when the quantity of

water therein flowing is less than fifteen hundred and seventy-five (1575) cubic feet of water per second; and it was further prayed in said complaint that the said Superior Court in Mono County further adjudge that each of the said defendants, including Miller & Lux, are estopped to claim or assert against the Rickey Land and Cattle Company, its grantees, successors or assigns, any right, title, claim, interest or estate, in or to any of the waters, or to the use thereof, now flowing, or which may hereafter flow, in said West Fork of said Walker River in the State of California, when the quantity of water therein flowing is less than fifteen hundred and seventy-five (1575) cubic feet of water per second.

VII.

That on the 15th day of October, 1905, the said Rickey Land and Cattle Company, petitioner herein, commenced an action in the Superior Court of Mono County, State of California, against one hundred and fifty-one (151) defendants, including Miller & Lux, the complainant in said action commenced in the United States Circuit Court for the District of Nevada, on the 10th day of June, 1902.

That said action was commenced in Mono County by the filing of a complaint by said Rickey Land and Cattle Company in said Superior Court of Mono County, in which said complaint said Rickey Land and Cattle Company alleged that the Rickey

Land and Cattle Company had been since the 6th day of August, 1902, the owner of, and in possession of, and entitled to the possession of certain lands in the State of California, which said lands were the lands so conveyed by said Thomas B. Rickey to said Rickey Land and Cattle Company; and in said complaint it was further alleged that the said lands constituted one entire, continuous body of land, over, through and upon which said East Fork of the Walker River flows, and from time immemorial has flowed, and that said lands, and all thereof, are, and from time immemorial have been, riparian to said East Fork of the Walker River, situate along and bordering upon said East Fork of the Walker River.

It was further alleged in said complaint filed in said Mono County, State of California, that said Rickey Land and Cattle Company, petitioner herein, is the owner of and in possession of and entitled to the possession, use and enjoyment of, and has the right to divert, use and appropriate all the waters of said East Fork of the Walker River and its tributaries in the State of California to the extent of the constant flow of five hundred and four (504) cubic feet of water per second, for use upon said lands in the State of California, riparian to said East Fork of the Walker River; and it was further alleged that each of said one hundred and fifty-one (151) defendants in said action, including said defendant Miller & Lux therein, claims some right, title and interest

adverse to the Rickey Land and Cattle Company, complainant in said action in Mono County, in and to said constant flow of five hundred and four (504) cubic feet of water per second, or some part or portion thereof in the East Fork of the Walker River in the State of California.

And it was further alleged in said complaint in Mono County that said right, title and interest in and to said water so claimed and asserted by each of said defendants, including said Miller & Lux, to the waters of said East Fork of the Walker River are subordinate and subject to the said alleged ownership of said Rickey Land and Cattle Company, and its right to divert and appropriate from said East Fork of said Walker River in the State of California a constant flow of five hundred and four (504) cubic feet of water per second for use upon its lands.

And it was further prayed in said complaint in said Superior Court of Mono County that said court further adjudge that neither of the defendants in said action in Mono County, including said Miller & Lux, has any right, title, interest, claim or estate, in or to any of the waters, or to the use thereof, flowing, or which may hereafter flow, in said East Fork of the Walker River in the State of California, when the quantity of water therein flowing is less than five hundred and four (504) cubic feet of water per second.

And it was further prayed in said complaint in

Mono County that the said Superior Court of Mono County further adjudge that each of said defendants, including said Miller & Lux, are estopped to claim or assert against the Rickey Land and Cattle Company, its grantees, successors or assigns, any right, title, claim, interest or estate in or to any of the waters, or the use thereof, now flowing, or which may hereafter flow, in said East Fork of said Walker River, in the State of California, when the quantity of water therein flowing is less than five hundred and four (504) cubic feet of water per second.

That after the said actions were commenced in Mono County, State of California, as aforesaid, said Miller & Lux commenced this action in the Circuit Court of the United States for the District of Nevada, as an ancillary action to the original action of *Miller & Lux* vs. *Thomas B. Rickey et al.*, to restrain the Rickey Land and Cattle Company, petitioner, from prosecuting the two actions aforesaid commenced by the Rickey Land and Cattle Company in the Superior Court of Mono County, State of California, and said Miller & Lux in said last-named ancillary action alleged that the necessary effect of said actions so commenced in Mono County was to bring on for trial and determination, in said Superior Court of the State of California, the same issues presented by the said bill of complaint of said Miller & Lux in said suit so brought by it originally in the United States Circuit Court for the District of Ne-

vada, so far as relates to the issues made between said Miller & Lux and said Thomas B. Rickey, and to obtain from said Superior Court of the State of California a judgment determining said issues in advance of the determination of the same by the United States Circuit Court for the District of Nevada, and thereby to defeat the jurisdicion of he United States Circuit Court for the District of Nevada in the said suit of *Miller & Lux* vs. *Thomas B. Rickey et al.,* so pending before said court, and to hinder and embarrass the said United States Circuit Court for the District of Nevada in the trial of said issues, and in the enforcement of any decree which said United States Circuit Court for the District of Nevada may render in said suit of *Miller & Lux* vs. *Thomas B. Rickey et al.,* so pending before it.

And it was further alleged in complainant's ancillary bill of complaint herein that the further prosecution of said actions, or either of them, brought by the Rickey Land and Cattle Company, petitioner herein, would be in derogation of the jurisdiction of the United States Circuit Court for the District of Nevada, and the rights of Miller & Lux in the suit so brought by said Miller & Lux in said United States Circuit Court for the District of Nevada and then pending therein; and in said ancillary suit it was prayed that said Rickey Land and Cattle Company, petitioner herein, its agents, servants and attorneys, and all persons acting under or in aid of them,

or either of them, be enjoined and restrained from further prosecution as against Miller & Lux either of the said actions so brought by petitioner in said Superior Court of the County of Mono, State of California, and from taking any further step whatever in either of said actions commenced in Mono County as against Miller & Lux.

VIII.

In pursuance of the prayer of said Miller & Lux in said ancillary action, the United States Circuit Court for the District of Nevada made its order that the said defendant Rickey Land and Cattle Company, a corporation, show cause before said court why an injunction should not issue pending said suit according to the prayer of the complaint in said ancillary action.

That in pursuance of said order to show cause said Rickey Land and Cattle Company filed affidavits in said ancillary action in answer to said order to show cause, and the hearing was thereon had before said Circuit Court of the United States for the District of Nevada on the 25th day of June, 1906, and an interlocutory decree was made by said court. That by said interlocutory decree it was ordered, adjudged and decreed that said defendant Rickey Land and Cattle Company, its agents, servants and attorneys, and all persons acting in aid of them, or any of them, be enjoined and restrained from further prosecuting

as against said Miller & Lux either of the two actions commenced by the Rickey Land and Cattle Company in the Superior Court of Mono County, State of California, and from taking any further step whatsoever in either of said actions as against said Miller & Lux, pending the final hearing and determination of the said ancillary suit and until the further order of the said Circuit Court of the United States for the District of Nevada in said ancillary suit.

IX.

That after said decree in said ancillary action was rendered in due and proper season an appeal was prosecuted by the Rickey Land and Cattle Company from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, and all necessary and proper steps were taken for the prosecution of said appeal and the hearing of the same. That in due and proper season said appeal came on to be heard before said Circuit Court of Appeals for the Ninth Circuit, and after the hearing thereof, to wit, on the 4th day of March, 1907, the said interlocutory decree appealed from was affirmed by said Circuit Court of Appeals, and a decree to that effect was thereupon entered.

After the entry of said decree by said Circuit Court of Appeals, the Rickey Land and Cattle Company, in due time, filed with said Circuit Court of Appeals

a petition for a rehearing of the aforesaid appeal, which said petition for rehearing was, on the 20th day of May, 1907, denied by said Circuit Court of Appeals.

X.

That a true and correct transcript of the record on appeal in said case, together with a copy of the decree of the said Circuit Court of Appeals affirming the decree appealed from, and also a copy of the opinion of said Circuit Court of Appeals rendered thereon are herewith produced and filed in this court.

XI.

We respectfully submit that the Circuit Court of Appeals was in error in affirming the decree of the United States Circuit Court for the District of Nevada, for the following reasons:

1. The prosecution of the actions in Mono County, State of California, enjoined by the order and decree appealed from, would not, in any manner, way or form impair, infringe upon or interfere with the jurisdiction of the said Circuit Court of the United States for the District of Nevada, in the case of *Miller & Lux* vs. *Thomas B. Rickey and others* pending in the said Circuit Court at the time of the commencement of said action in Mono County.

2. That the issues to be tried in the said suits in Mono County, State of California, were not the same

issues as were to be, or could be, tried in the said case of *Miller & Lux* vs. *Thomas B. Rickey and others* pending in the United States Circuit Court, Ninth Circuit, District of Nevada.

3. That the subject matter of the suits in Mono County, State of California, was not in any part the same subject matter as was that of the case of *Miller & Lux* vs. *Thomas B. Rickey and others,* pending in the Circuit Court of the United States, Ninth Circuit, District of Nevada.

4. That the Rickey Land and Cattle Company is not a party to the said action of *Miller & Lux* vs. *Thomas B. Rickey and others* in the Circuit Court of the United States, Ninth Circuit, District of Nevada, and would not be bound in any manner by any judgment or decree rendered in that court.

5. That any judgment rendered in the said action of *Miller & Lux* vs. *Thomas B. Rickey and others,* pending in the Circuit Court of the United States, Ninth Circuit, District of Nevada, would not affect, quiet or determine the title of the Rickey Land and Cattle Company to the waters, or the use of the waters of the Walker River in the State of California, and the Court should not therefore have enjoined and restrained the Rickey Land and Cattle Company from prosecuting the said actions in Mono County, State of California, to quiet the title of said Rickey Land and Cattle Company to the said waters of Walker River in the State of California.

6. That the said Rickey Land and Cattle Company was not a party complainant or defendant in the said action of *Miller & Lux* vs. *Thomas B. Rickey et al.*, pending in the Circuit Court of the United States, Ninth Circuit, District of Nevada, and therefore the said Rickey Land and Cattle Company should not have been restrained from prosecuting said actions in the Superior Court of Mono County, State of California.

7. That the said Circuit Court of the United States, Ninth Circuit, District of Nevada, has no jurisdiction to try and determine the rights to the use of the waters of the Walker River in the State of California, nor the title of Thomas B. Rickey to the waters of the Walker River in the State of California, nor the right to the use of the water by the Rickey Land and Cattle Company in the State of California, in said action of *Miller & Lux* vs. *Thomas B. Rickey and others*, and therefore had no jurisdiction over the Rickey Land and Cattle Company, the successor in interest of Thomas B. Rickey to the use of said waters, and the right to the use of said waters, because said water was in the State of California, and the use of said water and the diversion of said water was made by said Thomas B. Rickey and by the Rickey Land and Cattle Company, his successor, in the State of California, and the water and the land upon which the use of the water was made was all in the State of California,

and not in the State of Nevada, and the said Circuit Court of the United States, Ninth Circuit, District of Nevada, has no jurisdiction to try the rights of the Rickey Land and Cattle Company to the waters of the Walker River in the State of California, or the title of the Rickey Land and Cattle Company to the use of the waters of the Walker River in the State of California, as the successor of Thomas B. Rickey.

XII.

The questions in this appeal involved are of great public importance and concern. In irrigation of land the waters of the stream are consumed. Throughout the western portion of the United States irrigation is absolutely essential to the prosperity of the communities dependent upon agriculture. Streams from which the water is received, in many instances, have their sources in one State, and in the course of the stream it flows through one State into and through another State. The certainty of title or right to use of the waters along the line of the stream is as essential to prosperity as is the title to the land upon which the water is used. A multitude of streams flow in or through more than one State and furnish water used for irrigation. Millions of dollars are invested in irrigation ditches and canals which divert water from such streams, and millions more are invested in farming enterprises dependent

upon the waters of these canals. The prosperity of the entire Western population is directly and closely connected with the use of water from its streams. The question of jurisdiction of the courts to determine the relative rights to water flowing in interstate streams should be put at rest.

As this is the first reported case in the United States courts where the Circuit Court having its district in the State through which the lower reaches of the stream flows has asserted jurisdiction to enjoin a diversion of water in another State through which the upper reaches of the stream flows, it is important that this Court put the question of jurisdiction beyond controversy.

In this particular case over one hundred of the defendants have filed separate cross-bills against co-defendants. These cross-bills present issues as to priority of use of water between the several defendants. If these cross-bills are entertained and the issues made by the cross-bills and the original bill are tried, many months of the time of the Court, many thousands of dollars of costs to the litigants must be expended before a decision is reached, which decision may be of absolutely no force because of the lack of jurisdiction in the Court. It is essential, therefore, in this particular case, that the question of jurisdiction be determined before the parties are subjected to the expenditure incidental to, and the time of the

Court occupied by what may ultimately prove to be a purposeless trial.

XIII.

That the questions involved in this appeal are of great public importance and concern, inasmuch as it should be finally determined by the court of last resort whether the jurisdiction of the United States Circuit Court, having its district in one of the States of the Federal Union, is infringed and interfered with by an action begun and prosecuted in the State court of another State, embracing the upper reaches of a stream, for the purpose of quieting the title to the waters of such stream flowing in the latter State for use upon lands lying in and riparian to that stream in the latter State, which said stream also flows into and through the State which constitutes the district of the United States Court, and in which United States Court there had, prior to the commencement of the action in the State court, been an action commenced against the grantor of the plaintiff in the action brought in the State court to enjoin said grantor from diverting any of the waters in said stream.

Your petitioner believes that the aforesaid decree of the Circuit Court of Appeals affirming the decree of the Circuit Court of the United States, Ninth Circuit, District of Nevada, is erroneous, and that this Honorable Court should require the said case to be

certified to it for its review and determination in conformity with the provisions of the act of Congress in such cases made and provided.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals, for the Ninth Circuit, commanding the said court to certify and serve to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein entitled the *Rickey Land and Cattle Company, a corporation, Appellant,* vs. *Miller & Lux, a corporation, Appellee, No. 1366,* to the end that the said case may be reviewed and determined by this court as provided in section 6 of the Act of Congress entitled An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes, approved March 3, 1891.

That your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate, and in conformity with said act, and that the said judgment of the said Circuit Court of Appeals in the said case and every part

thereof may be reversed by this Honorable Court. And your petitioner will ever pray.

THE RICKEY LAND AND CATTLE COMPANY.

By Thomas B. Rickey, President.

JAMES F. PECK,
CHAS. C. BOYNTON,
Solicitors for Petitioner.

State of California,
City and County of San Francisco—ss.

Chas. C. Boynton, being duly sworn, says that he is one of the counsel for the Rickey Land and Cattle Company, a corporation, petitioner, that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

Chas. C. Boynton

Subscribed and sworn to before me this 17th day of February, 1908.

My commission expires on the 12th day of February, 1909.

Flora Hall (seal)

Notary Public in and for the City and County of San Francisco, State of California.

Nevada
~~State of California,~~
~~City and County~~ of San Francisco—ss.

Thomas B. Rickey, being duly sworn, states that he is the President of the above-named petitioner, the Rickey Land and Cattle Company, and as such President has full knowledge of its business affairs, and particular knowledge of the matters and things set forth in the above petition, and of the conduct and proceedings in the above-entitled action; that he has read the foregoing petition subscribed by him and knows the contents thereof, and that the facts therein stated are true.

Thomas B Rickey

Subscribed and sworn to before me this 14th day of October, 1907.

C H Peters

Notary Public in and for the ~~City and~~ County of San Francisco, State of California. Nevada

I hereby certify that I have examined the foregoing petition and that in my opinion the petition is well founded as to matters of fact and as to matters of law, and that the case identified thereby is one, and is such, that the prayer of the petitioner should be granted by this Honorable Court.

Chas C Boynton

Of Counsel for said Rickey Land and Cattle Company, Petitioner.

No. 518.

IN THE

Supreme Court of the United States

OCTOBER TERM

RICKEY LAND AND CATTLE COMPANY (a Corporation),
Petitioner,

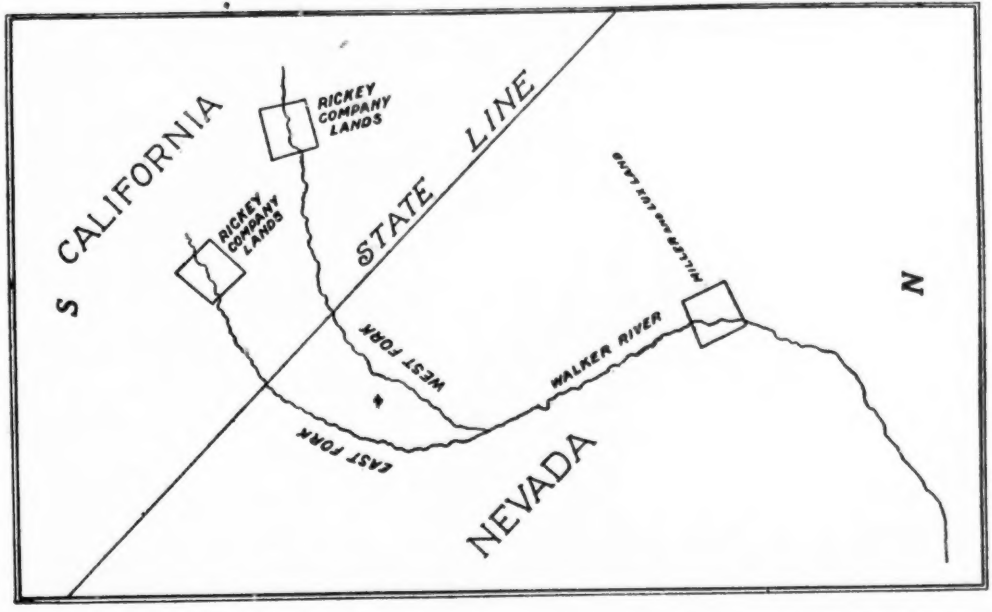
vs.

MILLER & LUX (a Corporation),
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

F. D. McKENNEY,
JAMES F. PECK,
CHAS. C. BOYNTON,
Solicitors for Appellant.

PRESS OF THE JAMES H. BARRY CO.
512-514 LEAVENWORTH ST.


S CALIFORNIA
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STATE LINE
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N
WEST FORK
WALKER RIVER
EAST FORK
NEVADA

IN THE

Supreme Court of the United States

OCTOBER TERM

RICKEY LAND AND CATTLE COMPANY, a Corporation,
Petitioner,

vs.

MILLER & LUX, a Corporation,
Respondent.

Brief in Support of Petition for Writ of Certiorari.

This petition is prosecuted from a decree of the United States Circuit Court of Appeals for the Ninth Circuit, affirming a decree of the Circuit Court for the district of Nevada, enjoining petitioner from prosecuting two actions in the Superior Court of Mono County, State of California, on the ground that the necessary effect of the prosecution of said actions would be to bring on for trial and determination the same issues as theretofore had been presented by a certain action brought by respondent in the United States Circuit Court for the district of Nevada, and

thereby interfere with and defeat the jurisdiction of the said United States Court.

For the purpose of simplifying the statement of the facts herein, we have prepared the accompanying plat of the properties involved in this litigation. The Walker River, it will be observed, rises in two branches, known as the East Fork and the West Fork, in the State of California, and flows through the eastern part of that State into and through the western part of the State of Nevada, to a point where the two branches join to form the main river, which flows on through the State of Nevada. Petitioner owns two tracts of land in the State of California, marked on the Plat, Rickey Company Lands, which said tracts of land are each riparian to a branch of the Walker River in that State. Petitioner claims a right to a certain definite quantity of the waters of each branch of the said river within the State of California to irrigate its said lands.

Respondent owns certain lands on the main Walker River in the State of Nevada, noted on the plat as Miller & Lux Lands, and claims a right to a certain definite quantity of the waters of the said river in the State of Nevada to irrigate said lands.

On July 10, 1902, said Miller & Lux commenced an action in the United States Circuit Court for the district of Nevada against one Thomas B. Rickey and 137 other defendants, and alleged that it was the owner, by appropriation, of certain rights in the

waters of the Walker River in the State of Nevada, and sought to enjoin the defendants in that action from diverting the water from the Walker River and depriving it of waters to which it was entitled (Trans., pp. 3 and 4).

On August 4, 1902, said defendant, T. B. Rickey, filed his plea to the jurisdiction of the said United States Circuit Court for the district of Nevada, setting up the facts that the Walker River rises in the State of California and flows therefrom into the State of Nevada, and that he owned certain lands on the said Walker River in the State of California, and claimed the right to divert water from the said Walker River in the State of California for the irrigation of the said lands, but disclaimed any claim of right or intention to divert any water from the said Walker River in the State of Nevada (Trans., p. 3).

Wherefore, said T. B. Rickey pleaded that the said United States Circuit Court for the district of Nevada had no jurisdiction to determine his right to appropriate and divert water from the Walker River in the State of California. His said plea was thereafter overruled (Trans., p. 4).

On the 6th day of August, 1902, said T. B. Rickey sold his said lands and water rights in the State of California to the Rickey Land and Cattle Co., a corporation, petitioner herein, which said lands are the lands designated on the plat (Trans., p. 7).

On the 15th day of October, 1904, the Rickey Land and Cattle Company, petitioner, commenced two actions in the Superior Court of Mono County, State of California, against said Miller & Lux and some three hundred other defendants, wherein it alleged that it was the owner of the right to divert and appropriate certain waters of the Walker River in the State of California, and sought to quiet its title to its water rights in the said Walker River in the State of California (Trans., pp. 8-11).

Thereafter said Miller & Lux, respondent, brought this action in the United States Circuit Court for the district of Nevada to enjoin petitioner from prosecuting said actions in the Superior Court of Mono County, State of California, on the ground that the necessary effect of the two last mentioned actions was to bring on for trial and determination in said Superior Court the same issues as were presented by the bill of complaint in the said original action of *Miller & Lux* vs. *T. B. Rickey*, and obtain from said Superior Court a judgment determining said issues in advance of any determination thereof by the United States Court in the original action, and thereby defeat the jurisdiction of the United States Circuit Court for the district of Nevada (Trans., pp. 15, 16). An interlocutory order and decree restraining appellant herein from prosecuting said actions in the California court was thereafter entered (Trans., p. 64), and from such order and

decree an appeal was taken to the Circuit Court of Appeals for the Ninth Circuit, where said decree was affirmed.

This writ is prayed for in order to have said decree reviewed by this honorable court.

PUBLIC IMPORTANCE OF QUESTIONS INVOLVED.

Preliminary to the discussion of the grounds wherein we contend that the Court of Appeals erred in making its decree herein, we submit the following brief statement of the great public importance and concern of the questions involved in this appeal.

In irrigation of land the waters of the stream are consumed. Throughout the western portion of the United States irrigation is absolutely essential to the prosperity of the communities dependent upon agriculture. The certainty of title or right to use of the waters along the line of the stream is as essential to prosperity as is the title to the land upon which the water is used. A multitude of streams have their source in one State and in their course flow through that State into and through another State, and furnish water used for irrigation in both States along their course. Millions of dollars are invested in irrigation ditches and canals which divert water from such streams, and millions more are invested in farming enterprises dependent upon the waters of these streams and canals. The prosperity of the entire

western population is directly and closely connected with the use of water from its streams. The question of jurisdiction of the courts to determine the relative rights to water flowing in interstate streams should be put at rest.

As this is the first reported case in the United States Courts where the Circuit Court having its district in the State through which the lower reaches of the stream flows has asserted jurisdiction to enjoin a diversion of water in another State through which the upper reaches of the stream flow, it is important that this court put the question of jurisdiction beyond controversy.

In this particular case over one hundred of the defendants have filed separate cross-bills against co-defendants. These cross-bills present issues as to priority of use of water between the several defendants. If these cross-bills are entertained and the issues made by the cross-bills and the original bill are tried, many months of the time of the court, many thousands of dollars of costs to the litigants must be expended before a decision is reached, which decision may be of absolutely no force because of the lack of jurisdiction in the court. It is essential, therefore, in this particular case, that the question of jurisdiction be determined before the parties are subjected to the expenditure incidental to, and the time of the court occupied by what may ultimately prove to be a purposeless trial.

We further submit that the questions involved in this appeal are of great public importance and concern, inasmuch as it should be finally determined by the court of last resort whether the jurisdiction of the United States Circuit Court, having its district in one of the States of the Federal Union, is infringed and interfered with by an action begun and prosecuted in the State court of another State, embracing the upper reaches of a stream, for the purpose of quieting the title to the waters of such stream flowing in the latter State for use upon lands lying in and riparian to that stream in the latter State, which said stream also flows into and through the State which constitutes the district of the United States Court, and in which United States Court there had, prior to the commencement of the action in the State court, been an action commenced against the grantor of the plaintiff in the action brought in the State court to enjoin said grantor from diverting any of the waters in said stream.

In this case the question of the sovereignty of a State over the realty within its boundary is directly involved. If the courts of one State have jurisdiction to adjudicate directly as to and bind the titles to real property in another State, there is nothing left to the sovereignty of the latter State except a shell. A State acting within constitutional limitations is supposed to be absolute in the enactment and enforcement of laws governing the title to real property situate within

that State. But if foreign courts, in no way responsible to the people of a State, have power to adjudicate directly as to and bind titles to realty in the State, none of the attributes of sovereignty remain except the name. That is one of the vital questions that form the basis of this appeal.

There is a single question involved in this appeal. *It is as to the jurisdiction of the United States Circuit Court for the district of Nevada, in a local action, over water rights* IN THE CALIFORNIA PORTION OF A STREAM, *which stream rises in and flows through and out of the State of California into and through the State and district of Nevada.*

As noted in the statement of facts, the decree herein rests on the proposition that the actions commenced by petitioner in California present the same issues as were theretofore presented by the action commenced by respondent in the United States Circuit Court of Nevada (Trans., pp. 15, 16).

We desire to argue a single proposition, viz., THAT THE ACTIONS COMMENCED BY PETITIONER IN CALIFORNIA DID NOT, AND COULD NOT, PRESENT THE SAME ISSUES AS WERE PRESENTED BY THE ACTION COMMENCED BY RESPONDENT IN NEVADA, FOR THE REASON THAT THE COURT SITTING IN NEVADA HAS NO JURISDICTION TO TRY ANY ISSUE PRESENTED IN THE CALIFORNIA ACTIONS, or vice versa.

The primary propositions in support thereof are:

1. *The action in Nevada is a local action to quiet title to realty, which, from the inherent limitations on the jurisdiction of the said United States Circuit Court must necessarily be situate exclusively within the State of Nevada, and thus the only issues presented by said action are as to respondent's title to said realty in Nevada.*

2. *The actions in California are local actions to quiet title to realty, which, from the inherent limitations on the jurisdiction of the said California Court, must necessarily be situate exclusively within the State of California, and thus the only issues presented by said actions are as to petitioner's title to said realty in California.*

Wherefore, the issues presented in the California actions being as to the title to realty in California can not be the same issues as are presented in the Nevada actions, which are as to the title to a different realty, situate in Nevada.

Both the actions commenced by respondent in the State of Nevada and the two actions commenced by petitioner in the State of California, were actions to establish and quiet title to real property and were local actions, and each action was local to the State wherein it was brought. This doctrine, with which we fully agree, was announced by the Court of Ap-

peals in this case, (see *Rickey Land and Cattle Company* vs. *Miller & Lux,* 152 Fed., 11,) and is supported by the authorities cited in the opinion, as well as by the leading case of *Northern Indiana R. R.* vs. *Michigan Central R. R. Co.,* 15 How., 233, and by the following authorities as well:

Stillman vs. *White Rock Mfg. Co.,* 23 Fed. Cases, 83; No. 13446;
Morris vs. *Remington,* 1 Parsons (Penn.), 387;
Gould on Waters, 3d. Ed., par. 445;
Bumps on Fed. Prac., p. 138;
Angel on Watercourses, 7th Ed., par. 418;
Enc. of Pleading and Practice, Vol. 22, p. 1158;
Bouvier's Law Dictionary, p. 66, par. 9;
Gould on Pleading, p. 114;
The Company of the Mersey vs. *Irwell Mfg. Co.,* 2 East, 498;
United States vs. *Rio Grande Dam, etc., Co.,* 174 U. S., 690;
Bates' Fed. Eq. Pro., par. 71;
United States vs. *Winans,* 73 Fed., 72;
Pomery Eq. Jrsp., Sec. 298;
Mississippi & Mo. R. R. Co. vs. *Ward,* 67 U. S., 485.

It is universally held that the jurisdiction of a court in a local action is confined to a subject matter

situate within the territorial limits of the court's jurisdiction.

Northern Indiana R. R. Co. vs. *Mich. Central R. R. Co.*, 15 Howard, 233;
Livingston vs. *Jefferson*, 1 Brock, 203, Fed. Case No. 8411;
McKenna vs. *Fiske*, 1 Howard, 241;
Massey vs. *Watts*, 6 Cranch, 148;
Conant vs. *Deep Creek Irrigation Co.*, 23 Utah, 627, 66 Pac., 188;
Davis vs. *Headley*, 22 New Jersey Equity, 115;
Carpenter vs. *Strange*, 141 U. S., 105;
Guaranty Trust Co. vs. *Delta Co.*, 104 Fed., 5;
Story on Conflict of Laws, 7th Ed., Sec. 5433, p. 685;
Watts vs. *Waddle*, 6 Peters, 389;
Watkins vs. *Lessee*, 16 Peters, 25;
Corbett vs. *Nutt*, 10 Wallace, 457;
Boyce vs. *Grundy*, 9 Peters, 275;
Baltimore Association vs. *Alderson*, 90 Fed., 142;
Farmers' Loan & Trust Co. vs. *Northern Pacific Railroad*, 69 Fed., 871;
Bates' Fed. Equity Procedure, Secs. 70-75;
Texas & Pacific Railroad Co. vs. *Gray*, 86 Texas, 571;
Pine vs. *New York*, 185 U. S., 93;
People vs. *Central R. R. Co.*, 42 N. Y., 283.

The distinction between local and transitory actions exists as much in determining the jurisdiction of courts of equity in equitable proceedings as it does in courts of law in legal proceedings. This doctrine was also announced by the Court of Appeals in this case. See *Rickey Land and Cattle Company* vs. *Miller & Lux,* 152 Fed., p. 11.

See also,

Wharton, Conflict of Laws, 2d ed., 282, 288;
Lewin on Trusts, vol. I, p. 129, star pages 48-49;
Morris vs. *Chambers,* 29 Beaver, 246, same, 3 De G. and F., 583;
Dicy on Conflict of Laws, p. 214;
Harris vs. *Harrison Law Rep.,* 8 Chancery Appeals, 342;
Jenkins vs. *Lester,* 131 Mass., 355;
Bates on Fed. Equity Pro., Vol. 1, Sec. 75;
Huntington vs. *Atrol,* 146 U. S., 656;
Greeley vs. *Low,* 155 U. S., 58, 76;
Northern Indiana Railroad Co. vs. *Mich. Central Railroad Co.,* 15 Howard, 233;
Miss. & Missouri Railroad Co. vs. *Ward,* 67 U. S., 485;
Pomeroy, Equity Jurisprudence, 2d ed., Vol. 1, Sec. 298 and Sec. 1318;
Story's Conflict of Laws, 7th ed., Sec. 534, p. 685;

Stillman vs. *White Rock Manufacturing Co.*, Fed. Cases, No. 13,446;

Morris vs. *Remington*, select equity cases, Parsons, 387;

Gould on Waters, Sec. 446;

Atlantic Dredging Co. vs. *Bergeneck Railroad Co.*, 44 Fed., 208;

Story, Equity Jurisprudence, 12th ed., Sec. 774;

People vs. *Colorado Railroad Co.*, 42 Fed., 638;

Atlantic & Tel. Co., 46 New York Sup. Ct., 377;

Western Union Telegraph Co. vs. *Western Railroad Co.*, 8 Baxter, Tennessee, 54;

Marshall vs. *Turnbull*, 34 Fed., 827;

Western Union Telegraph Co. vs. *Pacific & Atlantic*, 49 Illinois, p. 90;

Fargo vs. *Redfield*, 22 Fed., 373-375;

Port Royal Railroad Co. vs. *Hammond*, 58 Georgia, 523;

Montgomery vs. *Commercial Bank*, 1 S. and M. and Ch., 632;

Northfork Railroad Co. vs. *Postal Telegraph Co.*, 88 Virginia, 396;

Linsey vs. *Silver Star Mining Co.*, 66 Pac., 382;

Texas & Pac. Railroad Co. vs. *Gay*, 86 Texas, p. 571;

Guarantee Trust Co. vs. *Deta & P. L. Co.*, 104 Fed., 5;
Baltimore B. N. L. Ass'n vs. *Alderson*, 90 Fed., 142;
Carpenter vs. *Strange*, 141 U. S., 87;
Farmers' Loan Trust Co. vs. *No. Pac. Railroad Co.*, 69 Fed., 871;
Washburn Easements, 3d ed., 692;
Smith's Leading Cases, p. 1064;
Encyclopedia of Pleading and Practice, Vol. 14, pp. 1122, 1125-1126, 1106;
Gould on Waters, 3d ed., Sec. 444;
Angel on Watercourses, 7th ed., Sec. 418;
Johnson vs. *Superior Court*, 65 Cal., 567:
Gilbert vs. *Water Power Co.*, 19 Iowa, 319;
People vs. *Central Railroad Co. of N. J.*, 42 N. Y., 283;
Wood on Nuisances, 3d ed., Sec. 830;
Gilbert vs. *Water & Power Co.*, 19 Iowa, 319;
Elred vs. *Ford*, 36 Wis., 530;
Horn vs. *City of Buffalo*, 49 Hun., 76;
Buck vs. *Ellenbolt*, 84 Iowa, 394.

These actions being to quiet title to real property, and the issues presented thereby being as to the title to the realty that constitutes the subject matter of the respective actions, in order to sustain the decree herein which is based on the finding that the same issues were presented by the California actions as

were theretofore presented by the Nevada action, IT MUST APPEAR THAT THESE RESPECTIVE ACTIONS HAD SOME COMMON SUBJECT MATTER OVER WHICH THE NEVADA COURT AND THE CALIFORNIA COURT HAD CONCURRENT JURISDICTION.

From the very nature of local actions and the limitations on the jurisdiction of these respective courts created by the Constitution and the laws of Congress set out and referred to in the foregoing authorities, it is a manifest impossibility for there to be a common subject matter, real property, over which in local actions courts, either State or Federal, sitting in different States, can have concurrent jurisdiction.

The only statute that we have been able to find that extends the jurisdiction of a Federal court in a local action so that it may in any case include a subject matter outside of its district, is contained in Sec. 742, Rev. Sts., which reads as follows:

> "Any suit of a local nature, at law or in equity, where the land or other subject matter of a fixed character lies partly in one district and partly in another, WITHIN THE SAME STATE, may be brought in the Circuit or District Court of either district, and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause *mesne* or final process to be issued and executed as fully as if the said subject matter were wholly within the district for which such court is constituted."

In no instance has the jurisdiction of courts, either State or Federal, been extended so that courts sitting in different States could have concurrent jurisdiction in a local action over a common subject matter situated either wholly in one State or wholly in the other State, or partly in one State and partly in the other.

Therefore, these actions being local actions to quiet the title to real property, it is inherently impossible that the same issues be presented in the actions brought by petitioner in California as were presented in the action brought by respondent in Nevada.

This petition might be submitted on the foregoing statement of these broad general principles on which all courts are in accord. But in view of the importance of the interests herein involved, and of the wide-reaching public importance of a decision finally determining the limits of the jurisdiction of the Federal Courts in actions involving water rights in interstate streams, we will respectfully submit the propositions herein set forth to a more minute and careful analysis.

In the discussion which will immediately follow, it will be assumed that the rights of both parties to the water of the stream stand on a parity. That is to say that both base their rights to the water upon appropriation. This is not, however, the case. The laws of the State of California confer rights upon the owners of riparian lands to use the water, and

the right is not determined by priority of use, as are the rights between appropriators. In fact, the right to use water by riparian owners in California is not dependent upon actual use. *Lux* vs. *Haggin*, 69 Cal., 255, while in Nevada the law is entirely of appropriation.

When, therefore, in the discussion, we place the rights of both parties upon the basis of appropriation, we are in a measure surrendering the advantage of position. In reviewing the decision of the Court of Appeals, we will call attention to this difference in the laws of the two States.

Putting aside for the time any consideration of the effect of rules limiting the jurisdiction of courts, what, in the broadest sense, are the property rights described by the facts set out in the bills of complaint filed in the courts of Nevada and California, respectively?

Briefly, respondent, in its original bill filed in the United States Circuit Court of Nevada, states facts showing the ownership of a right to divert and use for irrigation, certain water of the Walker River in Lyon County, Nevada (Trans., pp. 4-5). The primary elements of such a water right in a natural stream are:

First, the right to have the water flow, unimpaired in quality or quantity, from its source, down the stream to the point of diversion.

Second, of the right to divert the water from the stream when it reaches his point of diversion.

Cole vs. *Richards* (Utah), 75 Pac., 376;
Black's Pomeroy on Water Rights, par. 64;
Farnham on Waters & Water Rights, p. 3, Sec. 674;
Phoenix Water Co. vs. *Fletcher,* 23 Cal., 482.

The right of the appropriator to have the water flow unimpaired in quantity or quality from above, down the stream to his point of diversion, while it does not consist of an actual ownership of the corpus of the particles of water flowing in the stream above, yet it is a substantial right and interest in the stream itself which courts will protect.

Black's Pomeroy on Water Rights, Sec. 64;
Duckworth vs. *Watsonville W. & L. Co.* (Cal.), 89 Pac., 338;
Cole vs. *Richards* (Utah), 75 Pac., 376.

in which case the Court said:

"It is settled in this arid region by abundant authority that when the waters of a natural stream have been appropriated according to law, and put to a beneficial use, *the rights thus acquired, carry with them an interest in the stream from the points where the waters are diverted from the natural channel to the source from which the supply is obtained,* and any interference with the

stream by a party having no interest therein, that materially deteriorates the water in quantity and quality previously appropriated, to the damage of those entitled to its use, is unlawful and actionable."

Taken most broadly and construed most liberally in its favor, respondent's rights, acquired by its appropriations from this stream in Nevada, consist:

First, of the right to have the water of the Walker River flow, to the extent of respondent's appropriation, unimpaired in quantity or quality, from its source in the State of California, down through the State of California toward respondent's point of diversion as far as the California State line.

Second, of the right to have the water of the Walker River to the extent of respondent's appropriation, flow, unimpaired in quantity or quality, from the point where the stream crosses the State line from California into Nevada, down through the State of Nevada to respondent's point of diversion.

Third, of the right to divert the water when it reaches the point of diversion.

That the courts of California will protect respondent's right to have the water of the Walker River flow from its source, down through the State of California toward its point of diversion as far as the Nevada line, has been held in

Howell vs. *Johnson,* 89 Fed., 559;
Morris vs. *Bean,* 123 Fed., 618;

Hoag vs. *Eaton*, 135 Fed., 411;
Anderson vs. *Bassman*, 140 Fed., 14-20.

That the courts of the State of California have no jurisdiction to protect, determine, or affect respondent's right to have the water of Walker River flow from the point where the stream crosses the State line from California into Nevada, down through the State of Nevada to its point of diversion, or respondent's right to divert the water when it reaches its point of diversion in Nevada, is unanswerably announced in

Conant vs. *Deep Creek Irrigation Co.*, 23 Utah, 627, 66 Pac., 188;
Lamson vs. *Vailes*, 27 Colo., 201, 61 Pac., 231.

These authorities hold that to be the exclusive function of the courts of the State of Nevada.

Likewise, we submit, the courts of Nevada, State or Federal, have no jurisdiction to protect, determine, or affect respondent's right to have the water of Walker River flow from its source in the State of California down through the State of California. That is the exclusive function of the courts of the State of California. The courts of California possess, and will exercise that function.

Howell vs. *Johnson, supra;*
Morris vs. *Bean, supra;*
Hoag vs. *Eaton, supra;*
Anderson vs. *Bassman, supra.*

That the courts of Nevada do not possess, and can not exercise the function of determining and protecting rights in the California portion of the stream, we submit as the pivotal point in this case.

Turning to the rights of petitioner involved, as the subject matter in the actions brought by petitioner in the Superior Court of California, as described in the complaints, they consist of a water right in the Walker River in the State of California (Trans., pp. 8-13). This right, as we have seen in its elemental parts, consists:

First: Of the right to have the waters of the stream flow from its source down through the State of California unimpaired in quantity or quality to petitioner's point of diversion in the State of California.

Second: Of the right to divert the water at that point.

This is a right the Superior Court of California can protect, and an action to quiet title to this right was properly brought in said Superior Court. But it is obviously manifest that petitioner could not have brought an action in a court sitting in the State of Nevada, either State or Federal, to quiet its title to this water right in the State of California. A judgment of a Nevada court quieting title to real property in the State of California would be a mere nullity. Yet complainants, in the original action, are

simply turning the other side of the shield to the front and bringing an action in the State of Nevada in an attempt to quiet their title to a water right they claim in the stream in the State of California because they happen to also claim a water right in the stream in the State of Nevada.

The fact that respondent, by virtue of its appropriation in Nevada, happens to have a right in this stream in the State of Nevada, as well as in California, does not amplify the jurisdiction of the Nevada court so as to enable it to adjudicate the title in California. Petitioner might change his point of diversion and move it down the stream from the State of California into the State of Nevada, and thus acquire, in addition to his right to have the water flow down the stream in California, a right to have the water flow down the stream and be diverted in the State of Nevada, but by so doing, petitioner could not vest the Nevada court with jurisdiction over his right to have the water flow down the stream in California. It is true that, after he changed his point of diversion down the stream into the State of Nevada, the Nevada court could protect his right to have the water flow down the stream in the State of Nevada, but the Nevada court would have no more jurisdiction to protect his right to have the water flow down the stream in the State of California after he changed his point of diversion into the State of Nevada, than when the point of diversion was in the State of Cali-

fornia. The right to have the water flow down the stream is inherent in the stream, and is where the stream is, and that part of the right that is in the California part of the stream is exclusively within the jurisdiction of the California court, and that part of the right that is in the Nevada part of the stream is exclusively within the jurisdiction of the Nevada court.

Respondent's main argument in support of the jurisdiction of the United States Circuit Court for the State of Nevada was, that a stream is, by its very nature, an *indivisible res*. Being indivisible, if a part of it is within the jurisdiction of a court, the whole of it is within the jurisdiction of that court. Thus, as the lower portion of this stream flows through the jurisdiction of the United States Circuit Court for the district of Nevada, that court has jurisdiction to adjudicate the rights in the whole stream. Likewise, it can be argued that, as a portion of the stream flowed through the State of California, the stream being an *indivisible res*, the courts of the State of California have jurisdiction to adjudicate rights in the entire stream. In other words, the argument is to the effect that this stream is a subject matter over which the courts of these respective States have each complete and concurrent jurisdiction. As before observed, this argument of the *indivisible res* would empower the California court to adjudicate as to the

rights to have the water flow exclusively through and be diverted from the Nevada portion of the stream, and would empower the Nevada court to adjudicate the right to have the water flow exclusively through, and be diverted from the California portion of the stream. The fact that the water flows from the State of California into the State of Nevada could not render the jurisdiction of the California court over the Nevada portion of the stream any different from the jurisdiction of the Nevada court over rights in the California portion of the stream, if the stream is an *indivisible res.* If the stream is an *indivisible res,* it can not be divisible when you look down the stream, and indivisible when you look up the stream.

As above noted, there is no authority in law giving courts of different States concurrent jurisdiction over the same subject matter in a local action. There is nothing any more indivisible about a stream, then there is about a piece of land, or a wagonroad or a railroad lying partially in two States. It is true the particles of water usually flow one way in a stream, whereas the rights in a wagonroad or a railroad contemplate a movement in both directions along the way, but this would render them, if anything, more indivisible. A stream flowing from British Columbia into the United States, or vice versa, if an *indivisible res,* would be both wholly in the United States and wholly in British Columbia. But

this question of the indivisible nature of a stream and the concurrent jurisdiction of courts of different States thereover, is not an open question. It came before this court in the case of the *Miss. & Mo. R. R. Co.* vs. *Ward,* 67 U. S., 485.

Complainant in this action was the owner of steamboats navigating the Mississippi River, and the action was commenced in the United States Circuit Court for the district of Iowa for a mandatory injunction to enjoin the maintenance of a bridge across the Mississippi River from the State of Iowa into the State of Illinois, and to abate the same as a nuisance. The piers of the bridge created eddies in the stream and obstructed navigation and thus interfered with the plaintiff's right to navigate the stream.

It will be observed that the boundary line dividing the States of Iowa and Illinois is the center of the Mississippi River, and thus one-half of the stream and one-half of the bridge only were within the territorial limits of the jurisdiction of the United States Circuit Court for the district of Iowa. But if the stream is an indivisible thing, or if the courts of both States had concurrent jurisdiction, as was argued by counsel in the court below, there plainly could be no objection to the jurisdiction of the Circuit Court for the district of Iowa on the ground that one-half of the stream and one-half of the bridge were in the State of Illinois. But the Supreme Court of the United States did not view either the

bridge or the stream as indivisible, or the jurisdiction of the respective courts as concurrent over the entire stream, and held that the boundary line of the State of Iowa was the limit of the Iowa court's jurisdiction, and thus determined that the court could neither inquire into, nor adjudicate, concerning rights in the stream or the effect of the bridge on the Illinois side, although it affirmatively appeared that one of the piers of the Illinois side created an eddy that obstructed navigation on the Iowa side of the river.

The absolute definite limitation of the power of the United States Circuit Court for the district of Iowa to make inquiry and act on facts existing only in the Iowa side of the river, and its absolute inability to inquire into the effect of the Illinois portion of the bridge as an obstruction to navigation, is set forth clearly in the following language:

> "This is a question that we can not examine nor reach by a decree, as the relief suggested is clearly beyond our power in this suit. Congress could extend the jurisdiction of the Federal courts across the Mississippi River by enlarging the judicial district on either side, or it could confer concurrent jurisdiction on adjoining districts extending to trespasses and torts committed within the shores of the river. But the courts of justice can not do it unless authorized by an Act of Congress."

Again, Mr. Justice Nelson, while dissenting from

the majority opinion of the court, which determined not to take any action in the premises by reason of the fact that it was powerless to reach the entire bridge, and thus dismissed the bill, agreed with the court that the jurisdiction of the Circuit Court of Iowa was limited to that part of the bridge existing in the State of Iowa, and used the following language:

> "The east line of the State of Iowa, and which constitutes the boundary of the district of the Federal court, and, of course, of its jurisdiction, is the middle of the Mississippi River; and the same line constitutes the west boundary of the State of Illinois, and, of course, the limit of the jurisdiction of the Federal court in that State. One moiety, therefore, of the bed of this river is embraced within the local jurisdiction of this court for the district of Iowa, and the other moiety within the jurisdiction of the court for the district of Illinois. Neither court possesses any local jurisdiction over the entire river, and hence the idea that neither court is competent or equal to deal with the obstruction; and especially that the court in the Iowa district can not deal with it on the Illinois side; and for the same reason the court in the Illinois district could not, if the suit was in that court, deal with it on the Iowa side."

As stated above, nothing can be conceived of as much more indivisible than a bridge, for, divide a

bridge, and it is no longer a bridge, and in this case the stream of the Mississippi River was involved just as much as the bridge. The damage on which the action was based was produced by eddies in the river caused by the piers in the bridge; some of the piers being on the Illinois side, and some on the Iowa side. The true cause of the damage was the eddies in the stream, yet the Court held that the stream and its eddies was, as far as the jurisdiction of the court was concerned, absolutely divided by the boundary line in the center of the stream.

It has been contended as distinguishing this case that, this action being one to abate a nuisance, the court was required to act on the object, which it could not where the object was outside the territorial limits of the court's jurisdiction. *But this is the ultimate test of a court's jurisdiction over a subject matter—the power of the court to act on the res.*

The Court of Appeals lays stress on the fact that respondent's water right is *an easement* appurtenant to certain lands "REALTY" which lie in Nevada, and, speaking of the right or easement, says, "IT SAVORS OF, AND IS PART OF, THE REALTY ITSELF," and thus the suit is "*one concerning or pertaining to that realty*," from which the deduction is made that, the realty to which the right is appurtenant being in Nevada, the entire right itself must be in Nevada. The conception simply is that an easement must, of

necessity, have the same physical location as the land to which it is appurtenant. That this conception is obviously erroneous, seems too clear for argument. Nature fixes the location of easements. They are located in the servient tenement, and thus necessarily totally exterior to the dominant tenement to which they are appurtenant. As was said by way of illustration by Justice Woodbury in the leading case of *Stillman* vs. *White Rock Mfg. Co.,* 23 Fed. Cases, p. 83, in speaking of a water right in an interstate stream:

> "Thus a right of way on land in one State to a farm in another is an interest situated in the first State and an obstruction to it may be there prosecuted. There is nothing in the nature of easements or services attached to other property which makes them and the property identical in their locality. Nature fixes the locality of each, and one may be in one town, county, or State, and the other as well be beyond the dividing line in another, though contiguous, and a suit lie in another for the injury committed there."

See also,

Bannigan vs. *City of Worcester,* 30 Fed., 394.

By no form of specious reasoning can this right in the California portion of this stream be moved down and located within the territorial limits of the jurisdiction of the Nevada court simply because it hap-

pened to be appurtenant to land in Nevada. That conception would be directly in conflict with the cases of

Howell vs. *Johnson, supra;*
Morris vs. *Bean, supra;*
Hoag vs. *Eaton, supra;*
Anderson vs. *Bassman, supra.*

Those were each cases brought in the courts of upper States to protect and quiet the titles to water rights in the stream in the upper State, which righs were appurtenant to lands in the lower State. If the water rights appurtenant to land of necessity have the same physical and territorial location as the land, then in each of those cases there was no subject matter within the jurisdiction of the court.

But, even conceding this manifestly erroneous doctrine to be correct, conceding that respondent's land being located in Nevada has the effect of causing respondent's rights in this stream which are appurtenant to this land to be drawn down and located in Nevada, then there is nothing left within the jurisdiction of the California court to make a conflict. The California court simply has no jurisdiction over the subject matter, and its judgment would be a nullity and a vain act. Courts of equity will not interfere to restrain the doing of a vain act.

It is true that the subject matters of these actions

in California and Nevada, respectively, are quite closely related, inasmuch as the flow of the stream in Nevada is dependent on the flow of the stream in California, but that dependency does not make them one and the same. This argument is simply that of the *indivisible res* approached from a slightly different point of view.

An unlawful diversion in California may diminish respondent's right in the stream both in California and Nevada, lessening the flow of the stream in California, and, as a consequence, lessening the flow of the stream in Nevada. Violating and injuring respondent's rights in the stream in the State of California may cause, undoubtedly, a resultant injury to respondent's rights in the stream in the State of Nevada, but that does not change the location of the rights that are directly injured by petitioner. The right of the appropriator is to have the water flow unimpaired down the stream to the point where he desires to divert it. That right exists in the stream as an easement right up to the source and is there absolutely fixed at all times, and as the water flows down to the appropriator's point of diversion, it flows subject to this right. Petitioner's diversion in California, if a trespass, is one committed on respondent's right or easement to have the water flow down the stream in California toward its point of diversion. There is the true injury, and there is where respondent must have protection, irrespective of whether it

desires to divert the water from the California or the Nevada portion of the stream. If respondent can protect its rights in the stream in California, then it may receive the amount of water it is entitled to and desires to divert in the State of Nevada at the State line dividing the two States. Respondent's rights directly affected by the California action, are the rights to have the water flow unimpaired down the stream in and through the State of California toward the place where respondent may desire to divert the water, whether in California or in Nevada. For instance, suppose that respondent, instead of desiring to appropriate this water from the stream in the State of Nevada, should desire to appropriate it in the State of California, then, beyond question, its rights in the stream are in the State of California and beyond the jurisdiction of the Nevada court. *Conant* vs. *Deep Creek Irrigation Co., supra.*

Then let respondent change its point of diversion and use down the stream onto lands in the State of Nevada. By so doing, has it lost its rights in the stream in the State of California? Or has it not the very same rights in the stream in the State of California that it had before it changed its place of use? We respectfully submit it has. It has lost no rights in the stream in the State of California by changing its point of diversion and use to a point lower down on the stream and in the State of Ne-

vada, and it can at any time change its point of diversion and use back up the stream and into the State of California.

Hargrave vs. *Cook*, 108 Cal., 80;
Kidd vs. *Laird*, 15 Cal., 180;
Davis vs. *Gale*, 32 Cal., 26.

By changing his point of diversion and use from the State of California to a place lower down on the stream and in the State of Nevada, respondent may acquire rights in the stream in the State of Nevada, namely, to have the water flow uninterrupted down the stream in the State of Nevada, that it did not have when it diverted all the water it was entitled to in the State of California; but the acquisition of such new rights to have the water flow down the stream in the State of Nevada that would result from the changing of its point of diversion and use from a place up the stream and in the State of California to a place lower down and in the State of Nevada, would not carry with it the sacrifice or loss of any rights in the stream in the State of California. These rights to have the water flow down the stream in the State of California would be there just as much as they ever were, and any action having as its subject matter rights in the stream in California might affect these rights, but the rights affected would be just as much in the State of California in the case supposed after the point of diversion and place of use had

been transferred from the State of California down the stream into the State of Nevada, as they were prior to the change of the place of diversion and use, when both parties claimed the right to use the water in the State of California.

If the appropriator desires to divert the water in the State of California, the courts of California can give him complete protection, but if he desires to appropriate the water in the State of Nevada, the courts of California can protect his right to have the water flow down the stream in the California portion of the stream, but the courts in California can not protect his right to have the water flow down the stream in the Nevada portion of the stream. For this protection and the establishment of these latter rights, he must go into the courts of Nevada, which are the only courts having jurisdiction thereof.

Just as the courts of California can not protect the appropriator's rights to have the water flow down the stream through the State of Nevada, likewise the courts of Nevada can not protect the appropriator's right to have the water flow down the stream through the State of California. If it is the right to have the water flow uninterrupted down the stream through the State of California that is involved, appellees must go to the courts of the State of California for protection, and the fact that as a result of the invasion of their rights in the stream in California they have less water to divert from the stream in

Nevada, does not change the location of the right to have the water flow uninterrupted down the stream in the State of California. The rights to have the water flow down the stream in the State of California are in California, irrespective of the location of more or less direct or indirect consequences of an invasion of the rights to have the water flow uninterrupted down the stream in said State.

The precise point under discussion was involved in the case of *Stillman* vs. *White Rock Mfg. Co.*, 23 Fed. Cases, p. 83. In this case a stream flowed between the State of Rhode Island and the State of Connecticut. Plaintiff owned certain mills on the Connecticut side of the stream and the defendant diverted water on the Rhode Island side of the stream. The action was brought in the United States Court for the district of Rhode Island to enjoin the diversion, and the question of the jurisdiction of the Rhode Island court over the subject matter of the action was put in issue. The Court made it clear that the rights involved in that action were in the stream in Rhode Island, pointing out that as a result of defendant's diversion and invasion of complainant's right in the State of Rhode Island there might result a consequential injury to complainant in Connecticut, but the direct injury and the rights directly involved were located in the State of Rhode Island. The Court quite extensively discussed the questions there involved in the following language:

"Whether such injuries are to be considered as done to the soil and freehold of the owner on the side where that is situated, or to some corporeal easement or right incident to that which he enjoys undivided in the use of the whole water in the river in its natural flow or bed going across the center, and being entitled beyond it, to have the water employed only to the extent of one-half in quantity, would not in most cases be very material. If both sides of the river were situated in the same State, under the same laws, or were within the jurisdicion of the same courts, then to discriminate as to the precise extent and locality of the injury for which the action was brought would often be of little importance. But here, unfortunately, different States and different laws in some respects govern the two sides, and different circuits of this court possess jurisdiction on each side no less than different State courts.

"It becomes necessary, therefore, to ascertain now, *what is the interest, if any, which the complainants, by owning land on the Connecticut side of the river, are entitled to in the water on the Rhode Island side; and, indeed, this becomes almost the whole gist of the controversy.* After careful inquiry this interest seems to me to be such a corporeal easement or right as has just been described, to an undivided half of the water on that side, as well as on the other side. A fence or embankment can not be usually made in the middle of a large stream, where the right to the soil terminates; and, if made, it would not correspond with the true interests each owner on

the banks has to some extent in all the flowing water between those banks. Hence, it is reasonable to regard these interests in the whole stream to be an undivided half, or tenancy in common, and if either side uses or takes out more than half, or at a place above removes and diverts large quantities from coming at all to the dam where the complainants are interested, their proportionate interests in the whole stream are injured, and an action of some kind or other must lie for redress somewhere. *Ang. Water Courses,* p. 11, Sec. 3, and cases there cited; *Webb* vs. *Portland Mfg. Co.* (Case No. 17,322). Probably different forms of action may lie, as redress is sought for different views of the injury, and these different actions may be brought properly in one State or the other, as they relate more immediately to the acts done as affecting the land and mills the plaintiffs own in Connecticut, or as the affecting the undivided share in the water on the Rhode Island side, which the plaintiffs also own. The canal here being on the Rhode Island side, and first injuring the rights of the plaintiffs there to an undivided half of the stream, would seem to justify an appropriate remedy there for that particular wrong.

"*The injury thus far and in this view may be regarded as committed on interests possessed in the water beyond the center of the stream,* and not entirely on or to the mill and land situated upon one of the banks, or to merely that half of the stream which is contiguous. Such interests may exist in water and its use. 2 N. H., 259.

The first and direct injury, then, is to the easement and consequent rights existing beyond the center. The next consequential injury would be to the mills and land adjoining the stream before reaching the center on the Connecticut side, and an appropriate remedy for that would lie there. Thus, a right of way on land in one State to a farm in another is an interest situated in the first State and an obstruction to it may be there prosecuted. There is nothing in the nature of easements or services attached to other property which makes them and the property identical in their locality. Nature fixes the locality of each, and one may be in one town, county or State, and the other as well be beyond the dividing line in another, though contiguous, and a suit lie in the other for the injury committed there. 7 Cook, 62.

"The chief error in the position of the respondents is in supposing that the plaintiffs have no rights whatever beyond the center of the river, or no interests to be protected there." (Italics ours.)

See also *Bannigan* vs. *City of Worcester*, 30 Fed., 394.

THIS COURT CAN NOT AFFIRM THE DECREE HEREIN, WHICH WAS AWARDED ON THE NECESSARY GROUND THAT THE SUBJECT MATTER OF THE ACTION COMMENCED BY PETITIONER IN THE STATE OF CALIFORNIA IS THE SAME AS THE SUBJECT MATTER OF THE ORIG-

INAL BILL FILED BY RESPONDENT IN THE STATE OF NEVADA WITHOUT RULING DIRECTLY IN CONFLICT WITH THE DECISIONS ANNOUNCED IN THE ABOVE-CITED CASES OF

Howell vs. *Johnson,* 89 Fed., 559;
Morris vs. *Bean,* 123 Fed., 618;
Hoag vs. *Eaton,* 135 Fed., 411;
Anderson vs. *Bassman,* 140 Fed., 14-20.

These cases all hold that the right of respondent to have the water flow down the stream in the State of California exists in the State of California. If that were not the case, the Federal Court, in all these cases, would not have had jurisdiction over the subject matter therein being litigated. In each one of these cases the appropriator on the stream in the lower State brought the action to protect his rights in the stream and enjoin the diversion from the stream in the upper State, in the courts of the upper State. These actions were presented on bills of complaint of precisely the same nature as the original bill of complaint in the case of *Miller & Lux* vs. *T. B. Rickey et al.,* which the Court of Appeals, as we believe, correctly denominated an action to quiet title to real property and a local action. If the rights involved in those actions did not exist in the stream in the upper State, then it follows that the courts in each of those actions had no jurisdiction over the subject matter thereof.

But, we submit, that the decisions of the Court in those cases were correct. The rights therein involved were rights in the stream in the upper State, just as are the rights involved in the actions commenced by appellant herein in Mono county, California, to quiet its title to the waters of the Walker river, in the State of California.

Supposing that respondent herein had gone into the United States Circuit Court for the Northern District of California and commenced an action against appellant herein to enjoin appellant from diverting the water of the Walker river, in the State of California, and set up its rights and appropriations in said Walker river, where would have been the subject matter of that action? Clearly, it would have been exclusively in the State of California. Should respondent prevail, the said court of California would have jurisdiction to protect its rights to have the stream flow uninterrupted through the State of California, but the power of the California courts to protect respondent's rights in the stream would stop at the State line. It could deliver the water at the State line but no further. Petitioner herein might, if such a decree was rendered in the court in the State of California, set up a claim to the water in the stream in the State of Nevada, and above respondent's point of use in the State of Nevada, and the decree in the court of the State of California could in no wise determine the rights in

the stream in the State of Nevada or protect respondent's rights to have the water flow uninterrupted in the stream through the State of Nevada. To do this, respondent would have to have recourse to the courts of the State of Nevada.

As the rights and subject matter involved in the four cases above cited were within the jurisdiction of the respective courts, then it follows of necessity that the rights involved in the actions commenced by petitioner in the State of California are in the State of California. If these same rights and this same subject matter are within the jurisdiction of the court sitting in the State of Nevada, then it of necessity follows that the courts of the two States have concurrent jurisdiction over this subject matter, which is impossible, as Congress has not enlarged the jurisdiction of the Federal courts through whose districts interstate streams flow so as to include rights in the stream outside of the district of the court as well as rights in the stream within the district of the court.

If the courts in the above-cited cases had jurisdiction, they had jurisdiction because there were rights involved in those actions that were located in the stream in the upper State. Whatever those rights were, they could not be protected by the courts of the lower State because they were beyond the jurisdiction of the courts of the lower State. These were the rights of respondent that were involved in the

action commenced by petitioner in Mono county, California, and none of those rights are involved in the action pending in the State of Nevada. Thus, the subject matter of the actions is distinct and by no possibility could the two actions, having different subject matters, present the same issues; the issues in each action being as to the title of the respective subject matter therein being litigated.

In other words, suppose Miller & Lux, in addition to bringing the action in Nevada had also brought an action in the State of California. Would there have been any conflict between the two actions? Manifestly not. The action brought in the State of Nevada has for its subject matter the protection of rights in the stream in the State of Nevada, and the action brought in the State of California would have as its subject matter the protection of rights in the stream in the State of California. By virtue of the two actions, Miller & Lux would establish and protect its entire rights in the stream in California, as well as in Nevada, but it could not do this otherwise. By commencing an action in California, it could not protect its rights in the stream in the State of Nevada, and, likewise, by commencing an action in the State of Nevada it could not protect its rights in the stream in the State of California.

TO SUSTAIN THE DECREE HEREIN, IT IS NECESSARY TO APPLY THE DOCTRINE OF LIS PENDENS. TO DO SO THIS COURT MUST HOLD THAT THE SUBJECT MATTER OF A LOCAL ACTION COMMENCED IN THE STATE OF NEVADA IS REAL PROPERTY SITUATE IN THE STATE OF CALIFORNIA.

The original bill herein was filed against T. B. Rickey. On August 6, 1902, T. B. Rickey transferred his lands and water rights in the State of California to the Rickey Land and Cattle Company, petitioner herein, and the actions, the prosecution of which is herein enjoined, were brought by the Rickey Land and Cattle Company.

For the doctrine of lis pendens to apply, there must be a transfer of a res which is the subject matter of an action pending. (Black on Jdmts., §550; Freeman on Jdmts, §§ 196-7.) For the doctrine of *lis pendens* to apply, the *res* must be within the territorial jurisdiction of the court.

> *Carl* vs. *Lewis Coal Co.*, 96 Mo., 149;
> *Sheldon* vs. *Johnson*, 4 Sneed (Tenn.), 683.

The *res* transferred from T. B. Rickey to the Rickey Land and Cattle Company was situate wholly in the State of California and thus wholly outside of the territorial limits of the jurisdiction of the Nevada court, and thus the *res* transferred could not be the subject matter of the bill filed by respondent

in that action, yet the *res* transferred was the subject matter of the action in the Mono county suits, and thus it follows that there is no room for the application of the doctrine of *lis pendens* by which it is sought to connect petitioner herein with the original action of *Miller & Lux* vs. *Rickey et al.*

The theory on which the decree herein was rendered is that unseemly conflicts between courts should be avoided and prevented. Our answer is, that, if the courts of the State of Nevada take upon themselves the function of deciding as to titles to an interest in a stream flowing in the State of California, the necessary result of such a procedure will be unseemly conflicts between courts.

In California the doctrine of riparian rights in streams prevails, which doctrine is a part of the law of the State. In the State of Nevada the doctrine of riparian rights is not recognized. If the courts of the State of Nevada are going to take upon themselves the deciding of titles in streams flowing in the State of California, it is more than probable that their decision will be in conflict with the decision of the California courts on the rights in the stream, and we will have nothing but unseemly conflicts between courts.

But let the law be as we here contend. Let the Nevada appropriator have recourse to the courts of the State of Nevada to protect his rights in the

stream in the State of Nevada, and let him have recourse to the courts of California, State or Federal, to protect his rights in the stream in the State of California, and all will be harmonious and without conflict.

REVIEW OF THE DECISION OF THE CIRCUIT COURT OF APPEALS.

Before concluding this argument we deem it necessary to further discuss the conclusions and argument of the Circuit Court of Appeals in the case of *Rickey Land and Cattle Co.* vs. *Miller & Lux,* 152 Fed., 11. By doing so, we will put to the test the arguments made herein. The first two pages of that opinion are devoted to an undisputed proposition, namely, that the right to have water flow in a river to the head of a ditch is an incorporeal hereditament appurtenant to the ditch, or to the land upon which the use of the water is had.

This statement does not in any degree tend to locate the easement in the stream to which the incorporeal heriditament is attached. From the authorities cited the easement is not confined to any particular section of the stream, but is impressed upon the stream from its source to the head of the particular ditch. It is not undissolubly annexed to any particular ditch or to any particular land *(Jacobs* vs. *Lorenze,* 96 Cal., 340). The easement in the water may be transferred from a present owner to another,

and the present owner or such transferee may change the place of use or diversion so that the right is appurtenant to other lands or other ditches. Whatever changes are made in this respect, the location of the easement remains the same. It always remains a right in the particular stream.

It follows, therefore, that the determination of what particular land the easement is appurtenant to at any particular time does not in any manner determine or change the location of the easement.

The Court, therefore, made no progress toward the question of *jurisdiction* when it arrived at the conclusion that the right to have water flow to the head of a ditch was an incorporeal hereditament and was appurtenant to certain lands in the State of Nevada. The easement was in the stream and the stream was definitely located by nature, and this controlling fact can not be changed.

This easement claimed by Miller & Lux attached to the entire stream above the ditches of Miller & Lux. A part of this was in the State of Nevada and a part was in the State of California. To the part in the State of Nevada petitioner disclaims all interest. To the part in the State of California it asserts a right.

The Court of Appeals determined expressly that the original suit by Miller & Lux "is one to quiet title to realty," and that the right to water was to be treated as real estate, and further that the court of

Nevada could not quiet the title to land in the State of California.

It occurs to us that these conclusions should lead directly to a reversal of the decree appealed from and not to an affirmance of it. The subject matter of the Mono county case in California was unequivocally real estate in the State of California. The Court concluded that the Nevada court had no jurisdiction to quiet the title to this land. How, then, did the Court arrive at a conflict of jurisdiction between the two courts?

The reasoning of the Court supporting the jurisdiction is as follows, see page 17 (transcript, p. 19):

> "The appellant's counsel maintain that, because the appellant has set up in its answer and cross bill to the original suit that it has an appropriation in California for the purpose of irrigating lands in that State, therefore the court in Nevada has no jurisdiction to determine its rights in the State of California. The contention seems to us to be beside the question. The defendant will not be permitted, by thus setting up a cause of suit in the State of California, to defeat the jurisdiction of the court in the State of Nevada. The complainant must be permitted to proceed upon the case made by its pleadings, and the defendant can not defeat the jurisdiction by alleging that it has rights elsewhere, which may conflict with the rights of the complainant. It may be said that the court in Nevada has not the

power to quiet the title of the defendant in the State of California. But the defendant has the right to set up its conflicting interests, which arose in California, as a defense against the attempt of the complainant to have its title in Nevada quieted, because the complainant's title must depend upon whether it has the better right as against the defendant—the rights of the parties arising in the States in which their respective interests are found. So that the answer and cross-complaint of the defendant can only operate defensively in the original suit, and not to give the defendant a right to have its title also quieted in the State of California. Though the Nevada court is not authorized or empowered to settle the rights of the parties in the State of California, it may look, nevertheless, under the defensive answer to the appropriation in the State of California, to ascertain and determine whether such appropriation is prior and paramount to the complainant's appropriation, and, if not, then to settle and quiet complainant's title and rights thereto.

"That our position may be fully understood, we will extend the discussion a little. The water in the stream, which has a propensity to seek its level, and will continue in its current to the sea, is in strict reality the veritable thing in controversy. It knows not imaginary State or county lines, and is a thing in which no man has a property until captured to be applied to a beneficial use. The right of appropriation is recognized in law, which means the right of diversion

and use. It is the right, not to any specific water, but to some definite quantity of that which may at the time be running in the stream. So the right acquired by an appropriation includes the right to have the water flow in the stream to the point of diversion. The fact of a State line intersecting the stream does not, within itself, impinge upon the right. In other words, the appropriation may still be acquired, although the stream is interstate and not local to one State; nor will the mere fact that the stream has its source in one State authorize a diversion of all the water thereof as against an earlier and prior appropriator across the line in another State. On the contrary, one who has acquired a right to the water of a stream by prior appropriation, in accordance with the laws of the State where made, is protected in such right as against subsequent appropriators, though the latter withdrew the water within the limits of a different State. *Howell* vs. *Johnson,* 89 Fed., 556; *Hoge* vs. *Eaton,* 135 Fed., 411; *Anderson* vs. *Bassman,* 140 Fed., 14. So that in determining the right of appropriation in one State, it may become necessary to ascertain what are the rights in another, and a mere assertion of rights in the courts of the latter State can not operate to preclude the courts of the former from exercising cognizance over the entire subject matter before them. The very question that appellant makes was determined in the case of *Anderson* vs. *Bassman, supra.* 'It is objected by the defendants,' says Morrow, Circuit Judge, 'that the relief sought by the bill, in de-

termining the rights of the complainants to a specific quantity of the waters of the west fork of the Carson river, is beyond the jurisdiction of this court, in that it is asking the Court to pass upon titles to real property in another State.' "

As the whole decision rests upon this part of the opinion, we desire to follow this reasoning sentence by sentence to see wherein its error lies.

We are unable to understand what is alluded to in this language:

"The appellant's counsel maintained that because the appellant has set up in its answer and cross-bill to the original suit, that it has an appropriation in California for the purpose of irrigating land in that State, therefore, the court in Nevada has no jurisdiction to determine its right in the State of California. The contention seems to us beside the question. The defendant will not be permitted by thus setting up a cause of suit in the State of California to defeat the jurisdiction of the court in the State of Nevada."

There was no allusion to the answer of the defendant Rickey in the record and no argument was predicated upon any issue made by the answer, and there was no cross-bill whatever filed by Rickey in the original suit. We are unable to account for this statement in the opinion. Unless the Court intended to treat the complaints in Mono county as standing in the same relation to the original case, as would such

facts if stated in an answer or cross-bill, we do not know how to apply this part of the opinion. Manifestly to so apply a cause of action in another State, would be practically to make it a plea to the jurisdiction, not of the cause of action in Nevada, but to the cause of action in the State of California. And if Miller & Lux had *expressly* stated a cause of action in the water in the State of California, such plea would have been sustained.

The next sentence is also predicated upon the same conception:

> "Complainant must be permitted to proceed upon the case made by its pleadings and the defendant can not defeat the jurisdiction by alleging that it has rights elsewhere which may conflict with the rights of the complainant."

It is observed that the Court uses the words "can not defeat the jurisdiction." That is true, but this assumes that there is a jurisdiction to be defeated, the very question to be determined in this case. We are contending that the court has no jurisdiction, not that we have power to defeat such jurisdiction as the court has.

The next sentence: "It may be said that the court " in Nevada has not the power to quiet the title of " the defendant in the State of California." With this statement there is no controversy, but we do further contend that the court of Nevada, has no

power to quiet the title of the complainant, *Miller & Lux,* in the State of California, and because the court has no such power regarding the title of *Miller & Lux* to the water in the State of California, therefore there could be no conflict of jurisdiction between the two courts.

The opinion proceeding says:

> "But the defendant has the right to set up its conflicting interests which arose in California [which *are* in California, they never were in Nevada], as a defense against the attempt of the complainant to have its title in Nevada quieted, because the complainant's title must depend upon whether it has a better right as against the defendant, the rights of the parties arising in the States in which their respective interests are found."

We think this sentence suggests the fallacy of the opinion. It involves this proposition that the title of the plaintiff in the State of Nevada is determined by the title of the defendant in the State of California. This is specious in this, that it turns the subject of universal inquiry, *the title of Miller & Lux,* and looks at it from the standpoint of the title of the defendant. The defendant's title or right to use the water is not the question for adjudication.

If we keep in mind at all times that we are inquiring into the title of Miller & Lux in and to the water, and that the title of Miller & Lux is at all times the

subject matter of the action in Nevada, this statement in the opinion should read: "but the defendant "has a right to set up its conflicting interests which "are in California as a defense against the attempt "of the complainant to have its title in Nevada "quieted, because the complainant's title in Nevada "must depend upon whether complainant has the "better title as against defendant *in the State of Cali-* "*fornia.*"

The rights of the parties both attaching to the stream in the State of California; that is to say, the title of Miller & Lux in the State of Nevada depends upon the title of Miller & Lux to the water in the State of California.

By determining what the title of the defendant Thomas B. Rickey is to the water in the State of California is only another way of determining what is the title of Miller & Lux to the waters *in the State of California.* After determining the rights of Rickey in the State of California, we arrive at the rights of Miller & Lux by elimination, but the method of proof does not change the subject of inquiry, which at all times is the title of Miller & Lux.

It is admitted, however, that this inquiry as to the title of Miller & Lux in the State of California cannot be made by the court in Nevada, and this conclusion cannot be avoided by a declaration that the inquiry is not to determine the rights of Miller & Lux to the stream in the State of California, but is made

for the purposes of determining the rights of Miller & Lux in the stream in the State of Nevada.

In other words, Rickey, disclaiming any rights whatever in the stream in the State of Nevada, concedes the title of Miller & Lux to that part of the stream, and only challenges the interests of Miller & Lux in the State of California, which he at the same time says the courts of the State of Nevada have no jurisdiction to try and determine.

A further test of the fact is that when the rights of Miller & Lux are quieted in the State of Nevada, the only contemplated trespass upon the rights in the State of Nevada are to be made by physical diversions of the water in the State of California.

Miller & Lux claim an easement in the stream from their ditch in Nevada to the source of the river. Rickey claims an easement in that part of the stream only in the State of California. Why should it be said, therefore, that in determining the rights of Rickey in the State of California you are not at the same time determining the rights of Miller & Lux in the State of California? The very paragraph of the opinion above quoted asserts that Miller & Lux rights attached to the stream in the State of California.

The next sentence of the opinion, "so that the answer and the cross-complaint of the defendant can only operate defensively in the original suit, and not to give the defendant a right to have its title

" also quieted in the State of California." We fully agree that the court of Nevada cannot quiet the title of the defendant, nor for that matter, *of the plaintiff either,* in the State of California. The Court then proceeds: "Though the Nevada court is not author-
" ized or empowered to settle the rights of the parties
" in the State of California, it may look, neverthe-
" less, through the defensive answer to the appropria-
" tion in the State of California, to ascertain and de-
" termine whether such appropriation is prior and
" paramount to the complainant's appropriation, and
" if not, then to settle and quiet complainant's title
" and rights thereto."

Where? The statement admits that the inquiry is as to the respective rights of the parties in the stream in California. It tacitly admits the interest of both parties in that State, and an inquiry into those rights. Why, then, should the Court say that the inquiry is to determine Miller & Lux's rights in the State of Nevada, when directly the inquiry is in fact and substance to determine what are Miller & Lux's rights in the State of California. When the Court asserts that it can not adjudicate defendant's rights to the stream in California, it at the same time asserts that it can not adjudicate Miller & Lux's right to the stream in the same State. Yet an adjudication that defendant do not take water from the stream *in the State* of California, is an adjudication of the rights to water in that State in favor of the complainant.

The Court changed its viewpoint of the case. Sometimes it held fast to the fact that the subject of the action was the *asserted title of Miller & Lux* in the State of Nevada. Then the viewpoint shifted and argued as though the inquiry in the State of California was not as to the title of Miller & Lux, but was as to the title of the defendant. And it said, the inquiry is to determine defendant's rights in the State of California, so as to determine complainant's rights in the State of Nevada. We submit that the determination of Miller & Lux's rights in the State of California would determine as exactly what Miller & Lux's rights in Nevada were, as would the indirect process of determining what were the defendant's rights in the State of California. One method is direct to the purpose; the other is indirect by process of elimination. But at all times and under all circumstances the inquiry must be, and is: the asserted rights of Miller & Lux to the water. It never changes to an inquiry into defendant's title or rights at any place.

To make this clear, let us assume that judgment has been rendered for complainant quieting its title to the water, and that the judgment is offered in evidence of plaintiff's rights to the water in the suits in California. They would not be received in evidence as a muniment of title in the State of California. The entire argument of the Court of Appeals, on pages 19 and 20, is based upon an assump-

tion of jurisdiction in the court and then further assuming a contention on the part of appellant that the answer of defendant attempts to limit or circumscribe the admitted jurisdiction, whereas the real contention is that the court has no jurisdiction to be limited or circumscribed.

The contention of appellant is that as to the thing in issue of which the court of Nevada has power to determine no conflict of jurisdiction in the State of California can possibly arise.

Let us assume for a moment that the court of Nevada inquires into the rights of Mr. Rickey in the State of California merely for the purpose of determining what are the rights of Miller & Lux in the State of Nevada, and not for the purpose of determining what are the rights of Miller & Lux in the State of California. Then, what becomes of the doctrine of lis pendens?

If the action is local, and is substantially an action to quiet title in this case, and the thing, the title to which is said to be quieted is in the State of Nevada, then it follows that the nature of the action and the location of the thing was the same in *Howell* vs. *Johnson,* 89 Fed., 556; *Hoge* vs. *Eaton,* 135 Fed., 411, and *Anderson* vs. *Bassman,* 140 Fed., 14. As the action in each of those cases was commenced in the State which was uppermost on the stream, it would follow, under the announcement in this case, that the court did not have jurisdiction, because the

law of the State of California, then manifestly the appropriator of water in Nevada would have no greater standing to the water while flowing in the stream in the State of California than would the appropriator in the State of California. The suggestion of this question points the argument that the appropriator in the State of Nevada by being such has an interest in the stream in the State of California no greater or no less than he would have if his acts of appropriation had actually occurred in the State of California.

The right of a riparian owner in the State of California is a part and parcel of his land (*Lux* vs. *Haggin, supra*), so that in inquiring into the rights of appellant in the State of California to the water, you are at the same time inquiring into that which is a part and parcel of its land. As against such upper riparian owner taking *all* the water for use upon riparian land, the lower appropriator may be held to have no cause of complaint. If such should be the holding, then the appropriators in Nevada (in which State riparian rights are not recognized) would have no cause of complaint against Rickey, or the Rickey Land and Cattle Company, riparian owners, who use all the water in the State of California. The Federal Court must adjudge the rights of the parties in

the stream according to the laws of the particular State in which the rights are asserted.

Barney vs. *Keokuk,* 94 U. S., 324;
Parker vs. *Bird,* 137 U. S., 661;
Hardin vs. *Jordan,* 140 U. S., 371.

Such court cannot administer a common law exclusively appropriation, or exclusively riparian, to conform to the laws of Nevada or of California. It follows that the statement in the opinion of the Court of Appeals that the inquiry is merely to determine *priority of appropriation,* and to adjudge and command accordingly, ignores absolutely the riparian rights which are a part and parcel of the land in the State of California. The conclusion of the court from such a premise must necessarily be wrong. To adjudge the rights of Rickey or his successors in the State of California, the very title to the land of which the water is a part under the riparian law must be determined, and any command as to the use of such water on such riparian land is a command regarding the land itself.

There is what appears to be a radical inconsistency in the argument of the Court of Appeals in determining what is the thing, subject of the action, to sustain the jurisdiction, and what is the thing for the application of the doctrine of *lis pendens* against the transferee of Rickey. In the first argument the *title*

of Miller & Lux in the State of Nevada is declared to be the thing, and the inquiry into the rights of Rickey in the State of California but an incidental inquiry to ascertain what Miller & Lux's rights were in the stream in the State of Nevada. To be logically consistent this conception should be adhered to. The court should not change its viewpoint so as to sustain the jurisdiction upon the theory that the subject matter of the suit is the title of Miller & Lux in the State of Nevada, and then apply the doctrine of *lis pendens* upon the theory that the subject of the action is the title of Rickey in the State of California. This last has been done. Let us see. It is held that the Rickey Land and Cattle Co., as grantee of Rickey, will be bound by the judgment. How? The answer is by the rule of *lis pendens.*

The doctrine of *lis pendens* can only apply to such litigation as has some *thing* for its subject. The doctrine has no application in cases entirely personal. If the thing is Miller & Lux's title in Nevada, then to this thing the doctrine of *lis pendens* must be applied. As this thing was not conveyed by Rickey to the Rickey Land and Cattle Company, there would be no room for the application of the doctrine. The thing transferred by Rickey was the land and water in the State of California, and unless the thing about which Miller & Lux were litigating to quiet the title was this same property *in the State of*

California, then the doctrine of *lis pendens* would be excluded.

The Court of Appeals argues that the thing is in the State of Nevada as between Miller & Lux and Rickey to sustain the jurisdiction of the court and then impliedly grants, in order to apply the doctrine of *lis pendens,* that the thing is that which Rickey transferred to the Rickey Land and Cattle Company; that is to say, for the purposes of jurisdiction, the thing, subject of the suit, is in Nevada. For the purposes of the doctrine of *lis pendens,* the thing, subject of the suit, is in the State of California.

This inconsistency points an erroneous conception of the subject of the action in the State of Nevada, when the jurisdiction is sought to be extended into an inquiry of rights to the use of water in the State of California. In other words, the rule of *lis pendens* is applied to a subject matter, water in California, over which the court admittedly has no jurisdiction, while the court asserts its jurisdiction over water in the State of Nevada.

All of this contradiction disappears when we consider the action as it really is. First, an action the subject matter of which is in the State of Nevada. Secondly, there is attempted to be presented, between Rickey and Miller & Lux, an issue as to water in the State of California, viz., Miller & Lux's right to water *in the State of California,* of which the Court has no jurisdiction.

The trouble arises in attempting to apply the rule of *lis pendens* in a case where jurisdiction of a subject matter does not exist.

If the court of Nevada had no jurisdiction to try the title of Miller & Lux to the waters in the State of California, then the end could not be reached by indirection; that is, the end could not be attained by saying the inquiry into the rights of Rickey in California was to determine what were the rights of Miller & Lux in Nevada, and then applying the rule of *lis pendens* to a conveyance by Rickey of property in the State of California. All this juggling is made necessary by an attempt to affirm jurisdiction where jurisdiction does not exist.

Certainly a plaintiff has no right to an extension of the rule of *lis pendens* beyond all precedent when by bringing the action in the first instance in the proper State no such extension would be required. The rule or doctrine of *lis pendens* is intended to hold jurisdiction acquired; it is not intended to extend it.

There are other parts of the opinion of the Court of Appeals, which deal with abstraction so far as the conclusions of that court are concerned. These are in no sense pivotal, and the conclusions reached are in no manner connected with them.

Therefore, we respectfully submit that the actions commenced by petitioner in California did not, and

could not, present the same issues as were presented by the actions commenced by respondent in Nevada for the reason that the Court sitting in Nevada has no jurisdiction to try any issue presented in the California actions.

Wherefore, the Court below erred in making the decree herein.

Respectfully submitted. F. D. MCKENNEY,

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